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(28,679)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 724.

THE UNITED STATES OF AMERICA EX RELATIONE JOHN W. FRENCH, PLAINTIFF IN ERROR,

vs.

JOHN W. WEEKS, SECRETARY OF WAR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 Supreme Court of the District of Columbia.

At Law.

No. 65058.

THE UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH, Petitioner,

vs.

NEWTON D. BAKER, Secretary of War, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Petition for Writ of Mandamus.

Filed January 21, 1921.

In the Supreme Court of the District of Columbia.

At Law.

No. 65058.

THE UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH, Petitioner,

v.

NEWTON D. BAKER, Secretary of War, Respondent.

To the said Supreme Court of the District of Columbia:

Your petitioner and relator, John W. French, respectfully represents to the court:

1. He is a citizen of the United States and is temporarily residing in the District of Columbia; that he is an officer in the Regular Army of the United States (Infantry), with the rank of colonel, and files this petition in his own right against the defendant Newton D. Baker, who is Secretary of War and as such an officer of the Government of the United States and temporarily residing in the District of Columbia.

2. Petitioner represents that he was born in Texas, February 7, 1874; that he enlisted in the Regular Army of the United States on

the 16th day of May, 1895, and served as private, corporal, and sergeant of Company C, 21st Infantry, from the date of his
2 enlistment to the 17th day of July, 1898; that after a competitive examination he was duly nominated, confirmed by the Senate, appointed and commissioned, from the ranks of the Army, second lieutenant, 11th U. S. Infantry, the 22d day of June, 1898, and accepted the same the 18th day of July, 1898; thereafter, and in due course of lineal promotion in accordance with the law governing promotion as it existed up to June 4, 1920, he was, after due examination and a finding of moral, professional, and physical qualification, nominated, confirmed, appointed, and commissioned first lieutenant of Infantry the 2d day of March, 1899; that after a like examination and finding of moral, professional, and physical fitness he was nominated, confirmed, appointed, and commissioned captain, 24th Infantry, the 30th day of July, 1903; that after a like examination and finding of moral, professional, and physical qualification, he was nominated, confirmed, appointed, and commissioned major the 15th day of May, 1917; that he was nominated, confirmed, appointed, and commissioned lieutenant colonel (in the temporarily increased Regular Establishment) the 5th day of August, 1917; that thereafter by a system of selection, and not by promotion, he was appointed and commissioned colonel in the National Army the 11th day of May, 1918; and that he was duly appointed and commissioned colonel of Infantry, in the Regular Army of the United States, by promotion, on the 1st day of July, 1920, and served in such office and status until the 24th day of December, 1920, when an order was made by the respondent purporting to place him on the retired list and since which time he has been deprived of his office of colonel of Infantry in the Regular Army of the United States and of the pay, allowances, and emoluments of said office.

3. Petitioner avers that as an enlisted man and an officer in the United States Army for a period of service of 25 years, including arduous service in active campaign in all the wars in which this country has been engaged during that time, he has always rendered efficient service and has never been guilty of any neglect of duty, misconduct, or disqualifying habits.

4. Petitioner avers that in the month of July, 1920, he was informed by the War Department that a classification board convened by virtue of the authority of section 24*b* of the act of Congress of June 4, 1920, commonly called the Army Reorganization Act, had provisionally arranged him in Class B. Upon notification of the action of said board, petitioner, by virtue of the authority of said section of said act, requested a court of inquiry, and a court of inquiry was convened by the President at Fort Sam Houston, Texas, on November 1, 1920, to consider the sole question whether or not he should be continued in Class B, petitioner appearing and being represented before said court of inquiry by military counsel. On the 30th day of November, 1920, a copy of what purported to be the
3 record of the proceedings of said court of inquiry was furnished petitioner which showed that said court was of the opinion that petitioner should be retained in Class B.

5. Petitioner avers that in said court of inquiry he was not furnished with a full copy of the official records upon which his classification was based, as the statute mandatorily requires; that he is advised and believes, and so avers, that the record of the proceedings of the original classification board shows that the board reported that it had examined into the record of Colonel John W. French, Infantry, and upon consideration of his record as a whole, from the date of his first commission in the Army of the United States to the present date, finds that he should not be retained in the service; that full copy of petitioner's record as a whole from the date of his first commission in the Army of the United States to the said present date, that is, the date of the proceedings of the original classification board, was never furnished petitioner, but upon the other hand petitioner was furnished copies of brief extracts from his record, containing all and only the unfavorable portions of his record and omitting all favorable portions thereof. He avers, therefore, that said board of inquiry proceeded in flagrant violation of the plain mandate of the statute enacted for his benefit, in order that he might be fully informed of the nature and cause of the imputation against him, and might be furnished with a full copy of his entire record, including both favorable and unfavorable portions, in order that he might be fully prepared to meet said imputation, and petitioner is advised and believes, and so avers, that such violation of the mandate of the statute rendered the proceedings of said court of inquiry and all proceedings subsequent thereto and based thereon coram non judice and void.

6. Petitioner avers that immediately upon being informed of the recommendation of the court of inquiry he took steps to have civil counsel in or near the District of Columbia engaged to represent him before the final classification board and in all proceedings to be had in his case, and proceeded to prepare to take leave of his military duties and station in Texas and come to Washington for the purpose of conferring with counsel and preparing his case for presentation to the final classification board and to the President; that civil counsel was accordingly engaged on December 8, 1920, and on the following day, December 9, 1920, said counsel addressed a communication to The Adjutant General of the Army of the United States, for immediate reference to the final classification board, copy of which is hereto attached and made a part hereof, requesting that said board do not proceed to the consideration of the case of petitioner until counsel shall have been notified and until after they shall
4 have had a reasonable opportunity to make the necessary study of the record of the proceedings of the court of inquiry and make the proper representation in petitioner's behalf, and that in the meantime no action that could affect petitioner or his case unfavorably or in any degree prejudicially be taken, to which communication The Adjutant General of the Army of the United States replied by letter dated December 14, 1920, a copy of which is hereto attached and made a part hereof, stating that said communication from counsel had been received too late for consideration and that the case had already been considered by the final classification board

and that the action of that board has been approved by the Secretary of War.

7. Petitioner avers that on or about January 1, 1921, he received in official mail from the War Department a communication in words and figures as follows:

War Department,
Washington, December, 24, 1920.

Special Orders, No. 302-O.
PEM—423.
Confidential.
Extract.

1. By direction of the President, Colonel John W. French, Infantry, having been finally classified in Class B, and it having been further determined that such classification is not due to his neglect, misconduct, or avoidable, is retired from active service, after twenty-two complete years of commissioned service, under the provisions of section 24*b* of an act of Congress approved June 4, 1920. He will proceed to his home.

The travel directed is necessary in the military service.
Misc.

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

For official use only.
Not to be made public.

evidencing that the said Secretary of War, on December 24, 1920, unlawfully assumed to eliminate petitioner from active service in the Regular Army of the United States and place him on the unlimited retired list of the Army, in accordance with the provisions of said section 24*b* of the act of Congress approved June 4, 1920, commonly called the Army Reorganization Act, as aforesaid. In
5 view of the said communications hereinbefore set out petitioner believes, and so avers, that by order of the respondent, the said Secretary of War, a final classification board was convened and did consider petitioner's case, and that the said respondent assumed to approve of the proceedings and findings of said final classification board, and that by like order a board of officers was convened and did consider the cause of petitioner's classification, and that said final classification board, acting pursuant to the orders of said respondent, held and decided that petitioner should be eliminated from active service in the Army, and that said board of officers, likewise so acting, held and determined that petitioner should be placed upon the unlimited retired list of the Army, and that the said Secretary of War assumed to approve the proceedings and findings of said board of officers, all of which action was unlawful, null

and void; and as a result of said unlawful action by said final classification board, the said board of officers and the said Secretary of War, the respondent issued or directed to be issued the order hereinbefore set out unlawfully purporting to eliminate petitioner from the active list of the Army, deprive him of his lawful office as colonel of Infantry, United States Army, and place him on the unlimited retired list of the Army.

8. Petitioner avers that the proceedings of said final classification board and of said board of officers acting under and pursuant to the orders of said respondent were private, secret, precipitate, and unlawful and constituted a denial to him of due process of law; that no notice was ever given to him of the convening of said final classification board for the consideration of his classification, nor of the convening of the board of officers for the determination of the cause of his classification, nor of the personnel of said boards, nor of the time when his case would be considered by said boards, and that no opportunity was ever afforded him to be heard or to be represented before said boards, nor has he ever been furnished with a copy of the proceedings of said boards, or of any proceeding or action taken by the respondent, the Secretary of War, nor has he ever been given any information as to any action or proceeding taken by or had before said boards or the Secretary of War except for what is contained in the communications from the Adjutant General of the Army, addressed to petitioner and petitioner's counsel, hereinbefore referred to and made a part hereof, and that petitioner has been denied the opportunity to petition the President for an order in revision of the proceedings of said final classification board.

Petitioner is further advised and believes, and so avers, that the said final classification board, as convened and constituted by the said respondent, consisted of the same officers who constituted the original classification board in his case and who had, as such
6 original classification board, previously considered petitioner's case and had classified him in Class B, by reason whereof the members of the said final classification board were biased and prejudiced against the petitioner and were not competent to give and did not give petitioner's classification fair and impartial consideration, in flagrant violation of the statute and constituting a denial to petitioner of due process of law.

9. Petitioner is further informed and believes, and so avers, that the respondent has never caused, as the statute requires, but by his order has prevented, the record of the proceedings of said court of inquiry to be transmitted to the Judge Advocate General of the Army for his review, as the statute requires, and that consequently the said record of said court of inquiry has never been received and reviewed by the Judge Advocate General of the Army, as the statute requires, by reason whereof neither the final classification board nor the President nor the board of officers convened to determine the cause of classification was ever advised of the illegal character of the proceedings of said court of inquiry.

Petitioner is informed and believes, and so avers, that respondent

has never transmitted or caused to be transmitted to the President for his consideration, review, and action, as the law requires, the record of the proceedings of the said court of inquiry, the record of the proceedings of said final classification board, and the record of the proceedings of said board of officers convened to determine the cause of classification, and that consequently the President has never considered, reviewed, and acted upon any of said proceedings.

Petitioner is advised and believes, and so avers, that the said Newton D. Baker, Secretary of War, has assumed to act personally for and in the place of the President of the United States, and, so acting, has assumed to approve of the proceedings and findings of said court of inquiry, said final classification board, and said board of officers, and, so acting, has assumed to eliminate petitioner from the active list of the Army of the United States, to deprive him of his office as colonel of Infantry in the Army of the United States, and of his pay, allowances, and emoluments as such, and to place him on the unlimited retired list of the Army.

10. Petitioner is advised and believes, and so avers, that by reason of the unlawful acts as hereinbefore stated, petitioner has been unlawfully eliminated from the active list of the Army of the United States and unlawfully deprived of his office of colonel of Infantry of the Army of the United States and of the pay, allowances, and emoluments incident to said office, and has been unlawfully placed upon the unlimited retired list of the Army, in violation of the statute and without due process of law.

7 Wherefore, inasmuch as said respondent, in his attempt thus to eliminate petitioner from the active list of the Army and to deprive him of his office and the pay, allowances and emoluments incident thereto, and to place him upon the unlimited retired list of the Army, as aforesaid, has acted beyond his power and jurisdiction in the premises, and has done petitioner irreparable harm and injury, and inasmuch as the law provides no other remedy in the premises whereby petitioner can have relief, your petitioner prays:

(1) That a writ of mandamus may be issued and directed to the said Newton D. Baker, Secretary of War, commanding him to annul the proceedings and findings of the said court of inquiry, the said final classification board, and the said board of officers, and to vacate and to set aside the said order dated the 24th day of December, 1920, purporting to retire petitioner from active service, and to restore your petitioner to his said office of colonel of Infantry in the Army of the United States.

(2) For such other and further relief as the court may deem proper and the nature of the case may require.

And your petitioner will every pray.

JOHN W. FRENCH.
Petitioner.

ANSELL & BAILEY AND
T. T. ANSBERRY,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing petition by me subscribed, and know the contents thereof; and that the statements of fact therein made as upon personal knowledge are true, and those made as upon information and belief I believe to be true.

JOHN W. FRENCH.

Subscribed and sworn to before me this 21st day of January, 1921.

JENNIE M. RYAN,
Notary Public, D. C.

[SEAL.]

EXHIBIT "A."

December 9, 1920.

For immediate reference to the final classification board.
Re Classification of Colonel J. W. French, U. S. A.

The Adjutant General, United States Army,
War Department, Washington, D. C.:

SIR:

We beg to advise you that we have just been retained as counsel in the matter of the classification of Colonel J. W. French, Inf., U. S. A., to represent him before the final classification board and in all subsequent proceedings.

8 In such capacity, we have the honor to request that the final classification board do not proceed to the consideration of his case until after we shall have been notified and until after we shall have had a reasonable opportunity to make the necessary study of the record of the proceedings of the court of inquiry and make the proper representation in his behalf; and, generally, that in the meantime no action of any kind that could affect him or his case unfavorably, or in any degree prejudicially, be taken.

The record was not received by Colonel French until sometime after November 25th, last, and was not placed in our hands until yesterday, December 8th.

We shall proceed to brief this case without unnecessary delay.

Very respectfully,
(Signed) ANSELL & BAILEY,
Attorneys for Col. J. W. French, U. S. A.

EXHIBIT "B."

War Department,
The Adjutant General's Office,
Washington, December 14, 1920.

In reply refer to A G 201—French, John W.

Ansell & Bailey,
Attorneys at Law,
Suite 710-712 Albee Bldg.,
Washington, D. C.

GENTLEMEN:

In reference to your letter of December 9th, 1920, in the matter of the classification of Colonel J. W. French, Infantry, you are informed that this case has already been considered by the final classification board and the action of that board has been approved by the Secretary of War. Your request for the classification board not to proceed in the consideration of his case arrived too late to receive consideration.

Very respectfully,
(Signed) P. C. HARRIS,
The Adjutant General.
(Signed) J. A. U.

Rule to Show Cause.

Filed January 21, 1921.

* * * * * * *

Upon consideration of the petition this day filed herein by the United States of America ex relatione John W. French it is by the court this 21st day of January, 1921, ordered that the said Newton D. Baker, Secretary of War, be and he hereby is commanded
9 and ordered to show cause, on the 28th day of January, 1921, why the writ of mandamus should not issue out of this court commanding him to annul the proceedings and findings of the court of inquiry, the final classification board, and the board of officers, and to vacate and to set aside the said order dated the 24th day of December, 1920, purporting to retire the relator, John W. French, from active service in the Army of the United States, and to restore the said relator to his said office of colonel of Infantry in the Army of the United States; provided that a copy of this order is served upon the said respondent, Newton D. Baker, on or before the 24th day of January, 1921.

By the Court.

WALTER I. McCOY,
Chief Justice.

Answer of Defendant to Petition and Rule.

Filed January 25, 1921.

* * * * * * *

Newton D. Baker, Secretary of War, now and at all times saving and reserving unto himself all exceptions to the imperfections, uncertainties, and defects in the petition for writ of mandamus filed herein, and reserving unto himself the benefit of the lack of juris-

diction of the court, appearing on the face of said petition, to grant the relief prayed for, and the lack of jurisdiction of the court to direct him, as Secretary of War, to perform the act in question, and relying on the same, as if demurrer had been specifically interposed, for answer to said petition, or so much thereof as is material, and to said rule to show cause, says:

1. He admits the allegations of the first paragraph of the petition except the allegation that plaintiff is an officer in the Regular Army of the United States (Infantry) with the rank of colonel, as to which defendant avers that plaintiff was such up to December 24, 1920, but that on and after that day he was and is a colonel on the retired list of the United States Army.

2. He admits the allegations of the second paragraph of the petition except the last five lines thereof, as to which defendant avers that on the 24th day of December, 1920, plaintiff was placed on the retired list of the Army in accordance with law, as more fully hereinafter set forth, and that since that date plaintiff has been and now is a colonel on the retired list of the Army.

3. With respect to the third paragraph of the petition he admits that plaintiff served during the period and in the wars and campaigns therein mentioned; that he has never been guilty of any serious neglect of duty or misconduct; that his habits, so far as known to the defendant, are good; but he denies that plaintiff has always rendered efficient service.

4. He admits the allegations of the fourth paragraph of the petition, except the allegation that the court of inquiry therein referred to was convened to consider the sole question whether or not plaintiff should be continued in class B, as to which defendant avers that said court of inquiry considered all questions required by the statute to be considered by said court, including the question whether or not plaintiff should be continued in class B.

5. Defendant denies the allegations of the first three lines of the fifth paragraph of the petition, and avers that plaintiff was, in the court of inquiry therein referred to, furnished with a full copy of all unfavorable reports, notations, or papers considered by either the original or final classification board in his case; that the same were the only records upon which his classification in class B was based or proposed to be based and that such course of procedure is, as defendant believes and therefore avers, in all respects as required by statute; and defendant further avers that in said court of inquiry plaintiff was given full opportunity to examine the entire record of his service as an officer of the Army from the date of his first commission therein to the date of the session of said court. Defendant admits, so far as they are matters of fact, the allegations of the remainder of the first sentence of paragraph 5; but with respect to the other allegations of said paragraph, defendant is advised by counsel that the same are matters of law or argument which are not well pleaded and that he

is not required to answer the same; and he therefore refrains therefrom.

6. Defendant is ignorant concerning the intentions and actions of plaintiff with respect to any engagment of or conference with counsel and therefore neither admits nor denies the allegations of the sixth paragraph of the petition in reference thereto, and reserves the right to call for strict proof thereof if deemed material. He admits the allegations of said paragraph with respect to the letter of December 9, 1920, from plaintiff's counsel to The Adjutant General of the Army and the answer of the latter of December 14, 1920, and avers that, as stated in said letter of The Adjutant General, plaintiff's case had at that time been considered and determined by the final classification board.

7. Defendant admits the allegations of the seventh paragraph of the petition to and including the quotation of the special order therein. With reference to the allegations of the second sentence of said paragraph, defendant admits that a final classification board was convened by him and considered plaintiff's case, and avers that said board was convened by him on behalf and by authority of
11 the President, as is more fully shown by Exhibits 1 and 2*a*, 2*b*, 2*c*, 2*d*, and 2*e* attached hereto, which are true copies, respectively, of the order convening the classification board and of orders amendatory thereof, which are prayed to be taken as a part hereof. With respect to the allegations of said seventh paragraph concerning certain boards therein mentioned, defendant admits that a board of officers was convened by him to consider and did consider the cause of plaintiff's classification, and avers that said board was convened by him on behalf and by authority of the President, as is more fully shown by Exhibit 3, attached hereto, which is a copy of the order convening said board, and Exhibits 4 and 5 attached hereto, which are copies of orders amendatory thereof, all of which are prayed to be taken as a part hereof. With respect to the allegations of said seventh paragraph concerning the holdings and decision of certain boards therein mentioned, defendant denies that said classification board and said board on cause of classification held and decided as alleged in said second sentence of paragraph 7, and avers that the final classification board found that plaintiff should be classified in class B, and that the board to determine whether plaintiff's classification was due to his neglect, misconduct, or avoidable habits determined such question in the negative.

With respect to the allegations of said seventh paragraph concerning approval or assumed approval by this defendant of the proceedings and findings of certain boards therein mentioned, defendant further denies that the proceedings and findings of the final classification board were approved by him, and avers that they were approved by the President in the manner and form more particularly set forth hereafter in paragraph 9 of this answer; and he denies that he has approved or assumed to approve the findings of the board to determine the cause of plaintiff's classification, and he refers the court to the allegations of the ninth paragraph hereof, in which his

acts and doings with respect thereto are fully and specifically set out. And with respect to the other allegations of the seventh paragraph of the bill defendant is advised by counsel that the same are matters of law or argument which are not well pleaded, and which he is not required to answer; and he therefore refrains from answering the same.

8. Defendant admits that the proceedings of the final classification board and of the board to determine the cause of classification were private, that no notice was given plaintiff of the convening of either or of the personnel of said boards or of the time when his case would be considered by either, but he denies that no opportunity was afforded plaintiff to be heard before either of said boards and avers that plaintiff was heard before those boards in that a
12 complete record of the proceedings of the court of inquiry before which plaintiff was heard, containing a copy of the testimony, statements, and evidence by plaintiff and in his behalf, was submitted to and considered by each of said boards. Defendant further admits that no copy has been furnished plaintiff of the proceedings of either of said boards, or of any proceedings or action taken by the defendant, that plaintiff has not been given any information as to any action or proceeding taken by or had before said board, or the Secretary of War, except as is contained in the communication of The Adjutant General referred to in said eighth paragraph, but defendant denies that he has taken any action preventing or hindering plaintiff from petitioning the President for an order in revision of the proceedings of said final classification board.

Defendant admits that the final classification board which finally classified plaintiff in Class B was the same board and composed of the same officers as the preliminary classification board, which provisionally classified him in Class B, except that after said provisional classification and before said final classification of plaintiff, one officer was relieved and another was substituted for him as is more particularly shown by Exhibits 1 and 2*a*, 2*b*, 2*c*, 2*d*, and 2*e*, hereto attached and hereinbefore referred to, but defendant denies that the members of said boards were biased, prejudiced or incompetent to give petitioner's classification fair and impartial consideration, and avers that they did give it such consideration. With respect to the other allegations of the eighth paragraph of plaintiff's petition, defendant is advised by counsel that the same are matters of law or argument which are not well pleaded and that he is not required to answer the same; and he therefore refrains therefrom.

9. In answer to the allegations of the first sentence of the ninth paragraph of the petition, defendant admits that the record of the proceedings of the court of inquiry in plaintiff's case was not transmitted to the Judge Advocate General or reviewed by him, and avers that he (defendant) has given no order either directing or preventing such reference to the Judge Advocate General. In answer to the allegations of the second and third sentences of said paragraph, defendant denies that he has assumed to act personally for and in place

of the President in and about the approval of the proceedings of which plaintiff complains, and avers that prior to any determination or classification in plaintiff's case, he laid before the President the whole matter of the procedure to be followed and the action to be taken in all cases of classification and determination under the provisions of Section 24*b*, and received from the President then and there a general authority and direction that he, as Secretary
13 of War, should, in all such cases take such action in the name of the President and by his authority by way of approval, revision or otherwise as from the circumstances shown by the record in each such case appeared to him to be right and proper, and that, pursuant to such authority and direction so received by him from the President he, as Secretary of War, took the following action, which was in all respects in accordance with such directions of the President:

(1) The signing by this defendant, on behalf and by authority of the President, at the foot of the record of the final classification board, but prior to the submission of such record to the board to determine the cause of plaintiff's classification, of the following notation: "Approved: Baker, Secretary of War."

(2) The signing by this defendant on behalf and by authority of the President on December 24, 1920, subsequent to the action of the board to determine the cause of plaintiff's classification, of an instrument of approval, a copy of which is annexed to this answer and marked Exhibit 6, which is prayed to be taken as a part hereof.

(3) The issuance on December 24, 1920, by order of this defendant on behalf and by authority of the President of a special order placing plaintiff on the retired list of the United States Army, of which a true copy, marked Exhibit 7, is attached hereto and prayed to be taken as a part hereof.

With respect to the other allegations of the ninth paragraph of the petition, defendant is advised by counsel that the same are matters of law or argument which are not well pleaded and that he is not required to answer the same, and he therefore refrains therefrom.

10. In answer to the allegations of the tenth paragraph of the petition so far as they are allegations of fact, defendant avers that in accordance with section 24*b* of the act of June 3, 1916, as amended June 4, 1920 (41 Stat., 759, 773), immediately upon the passage of the act of June 4, 1920, the President convened a board of not less than five general officers, as more fully set out in paragraph 7 of this answer, and shown by Exhibits 1 and 2 hereto, which board has been since its appointment and is now engaged in arranging all officers of the Army in two classes, namely, class A, consisting of officers who should be retained in the service, and class B, of officers who should not be retained in the service, and that said board in accordance with said statute provisionally arranged plaintiff in class B, and that plaintiff thereupon requested that a court of inquiry be convened before which he might be given an opportunity to appear, and that accordingly a court of inquiry was convened at Fort Sam Houston,

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Texas, before which plaintiff appeared in person and by counsel; that in such court plaintiff was furnished with a full copy
14 of the official records upon which his proposed classification was based, as has been more fully set out in paragraph 5 of this answer, and was given by and before said board full and free opportunity to present testimony of himself and others in his behalf and to be heard fully, of which opportunities he availed himself; and that the record of such court of inquiry was forwarded to the final classification board for reconsideration of plaintiff's case, and after such consideration the final classification board placed plaintiff in class B, which action was approved as more particularly set forth in paragraph 9 of this answer, and that the President has not ordered further revision of said finding of said classification board, and that after plaintiff was placed in class B as aforesaid, a board of three officers was convened to determine whether such classification was due to his neglect, misconduct, or avoidable habits, as more particularly set forth in paragraph 7 hereof and shown by Exhibits 3, 4, and 5 hereto, and that the finding of said board was negative, and that thereafter on December 24, 1920, by the order, a copy of which is attached hereto as Exhibit 7, plaintiff was placed upon the retired list of the Army in accordance with the statute hereinbefore cited and in all respects as provided by law.

Wherefore, having fully answered the allegations of plaintiff's petition, so far as he is advised by counsel it is necessary for him to answer, and having shown cause why the writ of mandamus should not issue against him as prayed in said petition, this defendant prays that he may hence be dismissed with his reasonable costs in this behalf sustained.

NEWTON D. BAKER,
Secretary of War.

JOHN E. LASKEY,
Attorney for the United States in and for the District of Columbia.
L. H. VANDOREN,
Assistant Attorney for the United States in and for the District of Columbia.
FREDERICK M. BROWN,
Judge Advocate, U. S. Army,
Of Counsel for the Defendant.
W. A. GRAHAM,
Judge Advocate, U. S. Army,
Of Counsel for the Defendant.
ARCHIBALD KING,
Judge Advocate, U. S. Army,
Of Counsel for the Defendant.

15 DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof, and that the state-

ments of fact therein made as upon personal knowledge are true, and those made as upon information and belief I believe to be true.

NEWTON D. BAKER.

Subscribed and sworn to before me this 25th day of January, 1921.

[SEAL.]

JNO. B. RANDOLPH,
Notary Public, District of Columbia.

EXHIBIT 1.

Special Orders No. 138:O.
Confidential.

War Department,
Washington, D. C., June 12, 1920.

Extract.

Par. 1. Paragraph 9, Special Orders 137-O (confidential), War Department, June 11, 1920, is amended to read as follows:

"Paragraph 33, Special Orders 134-O (confidential), War Department, June 8, 1920, is amended to read as follows:

"By direction of the President, a board of officers to consist of:
"Lieutenant General Robert L. Bullard, United States Army.
"Major General John F. Morrison, United States Army,
"Major General John Biddle, United States Army,
"Major General George W. Read, United States Army,
"Major General Charles P. Summerall, United States Army.
"Brigadier General Charles J. Bailey, United States Army,

"is appointed to meet in this city at 10.00 a. m., June 14, 1920, or as soon thereafter as practicable, at the call of the senior member thereof, and at such times thereafter as the senior member shall prescribe, for the purpose of making the classification of officers under the provisions of section 24*b*, chapter 1, act of Congress approved June 4, 1920.

"The board will call on the classification and data section, personnel branch, Operations Division, General Staff, for such data as may be necessary for its deliberations.

"Major William H. Dodds, junior, General Staff, is detailed as recorder of the board without vote.

"Such journeys as may be required of members of the board for the purpose indicated are necessary in the military service."

A. G. 334, 4 Classification Bd.

By order of the Secretary of War:

W. M. WRIGHT,
Major General, Acting Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

16 EXHIBIT 2A.

Special Orders No. 246-O.
Confidential.

War Department,
Washington, October 19, 1920.

Extract.

Par. 45. By direction of the President, Major General John L. Hines, United States Army, is detailed as a member of the board of officers appointed in paragraph 1, Special Orders No. 138-O, June 12, 1920, War Department, vice Major General Robert L. Bullard, United States Army, hereby relieved.

A. G. 334, Officers' Classification Board.

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

EXHIBIT 2B.

Special Orders No. 281-O.
Confidential.

War Department,
Washington, November 30, 1920.

Extract.

2. Major General George W. Read, United States Army, is relieved from further duty as a member of the board of officers appointed in paragraph 1, Special Orders No. 138-O, June 12, 1920. War Department (confidential).

A. G. (334.4. Classification Board.)

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

17 EXHIBIT 2c.

[Copy.]

OFF: RRP: GFB: HMD: 423.
A. G. (334.4. Class Bd.).
Confidential.
Detail as member of board.

November 30, 1920.

Major General William M. Wright,
United States Army,
Room 2034, Munitions Building,
Washington, D. C.:

1. You are appointed a temporary member of the board of officers appointed in paragraph 1, Special Orders No. 138-0 (confidential), June 12, 1920, War Department, for the purpose of making the classification of officers under the provisions of section 24*b*, chapter 1, act of Congress approved June 4, 1920.

By order of the Secretary of War:
RICHARD R. PICKERING,
Adjutant General.

EXHIBIT 2d.

Special Orders No. 286-0.
Confidential.

War Department,
Washington, December 6, 1920.

Extract.

103. Paragraph 2, Special Orders, No. 281-0 (confidential), November 30, 1920, War Department, is amended to read as follows: By direction of the President, Major General George W. Read, United States Army, is relieved from further duty as a member of the board of officers appointed in paragraph 1, Special Orders, No. 138-0, June 12, 1920, War Department (confidential).
(A. G. 334.4, Classification Board.)

By order of the Secretary of War:
PEYTON C. MARCH,
Major General, Chief of Staff.

Official:

P. C. HARRIS,
The Adjutant General.

EXHIBIT 2E.

Special Orders No. 286-0.
Confidential.

War Department,
Washington, December 6, 1920.

Extract.

104. The detail by direction of the President of Major General William M. Wright, United States Army, as a temporary
18 member of the board of officers appointed in paragraph 1, Special Orders, No. 138-0 (confidential), June 12, 1920, War Department, for the purpose of making the classification of officers under the provisions of section 24*b*, chapter 1, act of Congress approved June 4, 1920, to date from November 30, 1920, is announced. (A. G. 334.4, Classification Board.)

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

EXHIBIT 3.

Case No. —
Proceedings of a board of officers convened pursuant to the following order:

Special Orders No. 165-O.
Confidential.

War Department.
Washington, D. C., July 15, 1920.

Extract.

By direction of the President a board of officers to consist of

Brigadier General Andre W. Brewster, U. S. Army.
Colonel Grote Hutcheson, Cavalry,
Colonel Deane C. Howard, Medical Corps,

is appointed to meet in this city at 10.00 a. m. July 19, 1920, or as soon thereafter as practicable, at the call of the senior member thereof, and at such times thereafter as the senior member shall prescribe, for the purpose of determining whether or not officers were placed in Class B due to their own neglect, misconduct, or avoidable habits, under the provision of Section 24-*b*, act of Congress approved June 4, 1920.

Captain Frederick D. Griffith, junior, General Staff, is detailed as recorder of the board, without vote.

Such journeys as may be performed by members of the board in attending the meetings of the board and in returning to their proper stations upon the conclusion thereof, are necessary in the military service.

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

19 EXHIBIT 4.

Special Orders No. 210-O.
Confidential.

War Department,
Washington, September 7, 1920.

Extract.

72. The detail by direction of the President of Major Donald H. Connolly, General Staff, as recorder of the board of officers, appointed by paragraph 39, Special Orders, 165-O (confidential), July 15, 1920, War Department, for the purpose of determining whether or not officers were placed in Class B due to their own neglect, misconduct, or avoidable habits, under the provisions of section 24-B, act of Congress approved June 4, 1920, vice Major Frederick D. Griffith, jr., General Staff, as of September 3, 1920, is announced.

The travel directed is necessary in the military service.

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:

P. C. HARRIS,
The Adjutant General.

EXHIBIT 5.

Special Orders No. 274-O.
Confidential.

War Department,
Washington, November 20, 1920.

Extract.

Par. 21. By direction of the President, Major Clift Andrus, Field Artillery, is detailed as recorder of the board of officers appointed by paragraph 39, Special Orders, No. 165-O, confidential, War Department, July 15, 1920, for the purpose of determining whether or not officers were placed in Class "B," due to their own neglect, misconduct, or avoidable habits, under the provisions of section 24*b*, act of Congress approved June 4, 1920, vice Major Donald H. Connolly, General Staff, hereby relieved.

A. G. 334.1, Washington, D. C.

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

20 EXHIBIT "6."

A. G. 201—French, John W., Col.
Confidential.

War Department,
Washington, December 24, 1920.

The action of the classification board in finally classifying Colonel John W. French, Infantry, in Class B, is approved by the President, and, by his direction, a board of officers having determined that such classification is not due to the officer's neglect, misconduct or avoidable habits, Colonel French is retired from active service, after twenty-two years of commissioned service, under the provisions of section 24*b* of the act of Congress approved June 4, 1920.

(Signed) NEWTON D. BAKER,
Secretary of War.

EXHIBIT "7."

Special Orders No. 302-O.
PEM-423.
Confidential.

War Department,
Washington, December 24, 1920.

Extract.

1. By direction of the President, Colonel John W. French, Infantry, having been finally classified in Class B, and it having been further determined that such classification is not due to his neglect, misconduct or avoidable habits, is retired from active service, after

twenty-two complete years of commissioned service, under the provisions of section 24*b* of an act of Congress approved June 4, 1920. He will proceed to his home.

The travel directed is necessary in the military service.

Misc.

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:

P. C. HARRIS,
The Adjutant General.

21 *Demurrer.*

Filed January 31, 1921.

* * * * * * *

Comes now the relator, by his attorneys, and demurs to the answer of the respondent in the above entitled case and says that the same is bad in substance.

ANSELL & BAILEY,
T. T. ANSBERRY,
Attorneys for Relator.

NOTE.—Among the points of law to be argued in support of the foregoing demurrer are the following:

1. That the petition herein and the answer thereto show that the respondent, in placing the relator upon the retired list of the Army of the United States, did so in plain disregard and violation of the statute and transcended his power and jurisdiction in so doing.

2. That it appears by the petition and the answer thereto that the relator was not furnished with a full copy of the official records upon which the proposed classification was based, as the statute mandatorily requires.

3. That the respondent has never caused the records of the proceedings of the court of inquiry convened in relator's case to be transmitted to the Judge Advocate General of the Army for his review or revision, as the statute requires.

4. That the respondent has never transmitted, or caused to be transmitted, to the President of the United States said record of said court of inquiry for his consideration and action, as the law requires.

5. That the President of the United States has never considered, revised, or acted upon said record of said proceedings, as the law requires.

6. That neither the finding of the final classification board nor the board of officers in the relator's case was ever submitted to, or approved by, the President of the United States, as the law requires.

7. That the relator was given no opportunity to petition the President of the United States for a revision of the finding of the final classification board.

8. That the relator has not been placed upon the retired list of the Army of the United States by act of the President.

9. That the President was without the lawful authority to delegate to the Secretary of War the power to approve the finding of the said final classification board or the said board of officers, or to place the relator upon the retired list of the Army of the United States.

10. That the respondent was without legal authority to approve the finding of the said final classification board or the finding of the said board of officers.

22 11. That the respondent, in violation of the statute, did not inform the relator of the time of the convening of the final classification board to consider his case, nor did he give to the relator an opportunity to be heard or to present argument upon the law and the facts before the said final classification board.

12. That consideration of relator's case by the final classification board was in secret, without notice that it was being considered, and without any opportunity to relator to be heard.

13. That the said petition and answer show that the relator was not accorded due process of law in the proceedings had in his case.

14. That the final classification board was illegally constituted, in that it appears by said answer that the officers, with one exception, which constituted the original classification board in relator's case were the same officers who constituted the said final classification board which finally classified the relator, and its action in so finally classifying relator is accordingly null and void.

15. That the respondent was without legal authority to place the relator upon the retired list of the Army of the United States.

For other good and sufficient grounds of demurrer apparent on the face of said answer.

Supreme Court of the District of Columbia.

Thursday, March 10, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

It appearing to the court that the defendant herein, Newton D. Baker, Secretary of War, by resignation on the 5th day of March,

1921, vacated the office he held as such Secretary of War and was succeeded by John W. Weeks, and that it is essential to the protection of the plaintiff's rights in the above entitled cause that said John W. Weeks be substituted in the stead of Newton D. Baker, as the defendant in said cause, and counsel for the respective parties consenting thereto, it is by the court this the 10th day of March, 1921, ordered that the said John W. Weeks, Secretary of War, be and hereby is substituted as defendant in said cause in place and stead of the said Newton D. Baker, who resigned from said office as such Secretary of War.

Memorandum of Court.

Filed March 12, 1921.

* * * * * * *

I have not been able to reach a decision on all points involved but am of the opinion that the individual action of the President upon the findings of the final classification board is necessary.
23 I therefore sustain the demurrer to the answer. An opinion covering all points may be filed later.

WALTER I. McCOY,
Chief Justice.

Supreme Court of the District of Columbia.

Saturday, March 12, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

Upon hearing the demurrer of petitioner filed herein, to the answer of respondent to rule issued in this cause, it is considered that said demurrer be, and it is hereby sustained.

Rule to Show Cause.

Filed March 18, 1921.

* * * * * * *

On reading the annexed affidavit of Frederick M. Brown, verified the 17th day of March, 1921, it is

Ordered that the petitioner herein show cause before this court on the 21st day of March, 1921, at ten o'clock in the forenoon of that day, why the memorandum decision made herein March 12, 1921, should not be revoked and annulled and why reconsideration of all the issues herein should not be had and why petitioner's demurrer to the answer herein should not be overruled and why the petition herein should not be dismissed. And it is

Further ordered that service of a copy of this rule, if made on petitioner's attorneys on or before the 19th day of March, 1921, shall be sufficient

Washington, March 18, 1921.

WALTER I. McCOY,
Chief Justice Supreme Court.

Affidavit of Frederick M. Brown.

Filed March 19, 1921.

* * * * * * *

Frederick M. Brown, being duly sworn, deposes and says:

1. Deponent is of counsel for respondent in the above entitled cause and has had the primary responsibility for the presentation thereof subject to the direction of the Judge Advocate General. He was not assigned to that duty until on or about January 27, 1921.

24 2. Upon the original argument, January 29, 1921, of petitioner's demurrer to respondent's answer, deponent asked for two weeks' time for the preparation of a brief. Upon request by petitioner's counsel, however, the court fixed five days as the time for said purpose; whereupon deponent stated that he would be unable, within that time to prepare an adequate brief, that he would file such brief as the time fixed permitted, that he would thereafter prepare such a brief as he felt the case demanded, and that he hoped to be able to obtain leave to submit the same, when prepared, to this court.

3. Deponent submitted, prior to the expiration of the five-day period aforesaid, such a brief as it was possible for him to prepare, consistently with his other duties. Said brief was nevertheless wholly inadequate to meet the issues in this case and entirely insufficient to constitute proper assistance to the court in a case involving a highly important feature of a new statute creating a permanent system for the organization and administration of the Army; a statute which has not, prior to this case, received judicial consideration.

4. Preparation by deponent of the intended brief was greatly interfered with (1) by being required to give legal assistance to the Secretary of War in a considerable number of other cases in which action by him before the expiration of his term of office, March 4, 1921, was deemed necessary and (2) in consequence of the grave and critical illness of deponent's wife. Deponent's draft of said brief was therefore not completed until March 5, 1921; and the printing thereof at the Government Printing Office was not completed until March 16, 1921.

5. A memorandum decision was made by this court March 12, 1921, to the effect that the answer was deemed demurrable because it failed to show that the President of the United States had given

personal consideration to the matter of eliminating Col. French, and it showed, in fact, that he had not done so.

6. Deponent conceives that said decision was made under the pressure of apprehension lest on the afternoon of said March 12 the Senate might confirm an officer to the office otherwise held by Col. French and that petitioner might through delay lose the benefit of any order or judgment to which the petitioner might be entitled (Blake v. U. S., 103 U. S. 227). In deponent's opinion, several vital considerations were overlooked by the court in making said decision:

(1) The court appears to have misunderstood the Runkle case (122 U. S. 543). Chief Justice Waite, in limiting its doctrine to "proceedings judicial in character" (122 U. S. at 557), manifestly meant to refer to proceedings which are entirely judicial and did not include quasi judicial proceedings which are partly administrative (Orchard v. Alexander, 157 U. S. 372, 379). This is apparent from the entire context of the Runkle opinion and particularly from his unequivocal statement that he was dealing with proceedings that were judicial and "not administrative" (122 U. S. at 557).

(2) The Runkle doctrine has never been applied to quasi judicial or administrative determinations which the President is required to make: This is an extraordinary fact, if petitioner's contention is sound. On the contrary, the President's determinations of this nature have regularly been held to have been properly made for him by the heads of departments under power actually or presumptively delegated to them by him. Deponent feels that this court has overlooked the controlling effect upon this case of U. S. v. Chicago M. & St. P. Railway, 218 U. S. 233, which holds that a quasi judicial determination required by the swamp lands act of Sept. 28, 1850 (9 Stat. 519), to be made by the Secretary of the Interior may effectively be delegated by him to the Commissioner of the General Land Office. Apparently the court supposed that in making determinations required by the swamp lands act, the Commissioner was directly empowered to act. This would not be so unless the act of March 5, 1872 (17 Stat. 37), may be regarded as transferring to the Commissioner the Secretary's duty, under the 1850 act, of determining the character of the lands. As repeals by implication are not favored (Henrietta Mining Co. v. Gardner, 173 U. S. 123, 128), and as effect may be given to both acts by assuming that Congress intended the Commissioner's action under the act of 1872 to be advisory to the Secretary, it follows that in according finality to the Commissioner's decision, a delegation to him of the Secretary's powers under the act of 1850 is necessarily involved. Clearly this was the view of Mr. Justice Harlan, who, with reference to all the provisions of statute down to 1910, regarded the scheme of Congress as conferring "upon the Secretary of the Interior and upon him alone, the power to identify particular lands as swamp and overflowed lands embraced by the act of 1850." (218 U. S. at 242.) And Mr. Justice Harlan, had he looked upon the Commissioner as having

succeeded, in virtue of amendment to the act of 1850, to the power of the Secretary to determine the character of the lands, would not have been guilty of the folly of asserting that the Commissioner's decision, Oct. 21, 1876, "was in contemplation of law one by the Secretary of the Interior" (218 U. S. at 243) or of invoking the doctrine in Wilcox v. Jackson, Wolsey v. Chapman, French v. Fyan, and Ehrhardt v. Hogaboom. That the determination was quasi judicial is equally indisputable. (Brief, page 107).

(3) The court appears also to have overlooked the controlling effect upon this case of Stapleton v. Duell, 17 App. D. C.
26 575, 583, in which the statutory power (R. S. 4910) of deciding appeals as to which alleged inventor is entitled to a patent for the invention is held delegable by the Commissioner of Patents to the Assistant Commissioner. That the deciding of the appeal was a quasi judicial act is, of course, clear. (See Brief, pp. 99-102).

(4) The court appears to have failed to give due effect to R. S. 216, which, properly construed, authorizes the President to delegate to the Secretary of War the making of any determination incident to the administration of the War Department (brief, p. 102). The language used by Congress in R. S. 216 in authorizing the President to delegate his quasi judicial and other administrative functions to the Secretary of War is practically identical with the statutory language relied on in Stapleton v. Duell, 17 App. D. C. 575, 583, as authorizing the Commissioner of Patents to delegate his quasi judicial functions to the Assistant Commissioner. The act of June 4, 1920, and R. S. 216 ought to be harmonized.

(5) The court appears to have failed to give due weight to the fact that the elimination of Army officers involves no judicial act whatever. Section 24*b* is not penal, nor does carrying it into execution ever deprive a man of a property right (brief, pp. 90, 91, 73, 74, 77, 34, 47, 49). It follows that the French case is ruled by Williams v. U. S., 1 How. 290 (brief, 92-98), which involved a purely administrative determination, rather than by U. S. v. Chic., M. & St. P. Ry., 218 U. S. 233, which involved a quasi judicial determination. It matters not, of course, which of the two cases is exactly applicable; the result is the same under either.

(6) The court has apparently been misled into supposing that in the legislative history of the act of June 4, 1920, any just support is found for attributing to Congress the intent to compel the President in every case of elimination under section 24*b*, to bestow upon the proceedings his personal attention and consideration.

7. On March 15, 1921, immediately upon learning that deponent's said brief would be ready within a few hours, deponent called at the office of petitioner's counsel and saw both of them. He notified them of his purpose to apply, by rule to show cause, for a reconsideration of all the issues herein, especially that of the President's

right to delegate any duty under section 24*b* and asked them to suggest what time they desired in order to meet the points presented by deponent's said brief and to draft such reply thereto as they might desire to present to the court and, in any event, on what day or after what interval they desired the rule made returnable. They both refused to give any information concerning their attitude or desires. Deponent thereupon stated that he was considering asking this court to fix either March 19 or March 26 as the return
27 day and asked whether they cared to criticize this plan as giving too much time or too little time. This request for information was also refused.

Deponent listened to-day to statements by petitioner's counsel in the presence of the court as to how busy they were and how formidable deponent's brief, which had then been handed to them, appeared to be. In view of these statements, deponent respectfully suggests fixing April 2 as the return day in case the rule to show cause be granted.

8. The U. S. Senate has adjourned without taking action on any nomination that might interfere with either of the pending cases. Announcement has been made that it will not meet again until April 11, 1921.

9. Petitioner's counsel were understood as urging to-day in effect that a written opinion be handed down by the court immediately and without delaying to read deponent's present brief. Counsel stated that it would probably take them at least ten days to read the brief; presumably their view would be that the court, with its pressing duties and engagements, would require at least as long. The course referred to, if adopted by the court, would involve obvious injustice. The only brief for respondent in this case, of which the court has hitherto had the benefit, was a hastily prepared and wholly inadequate document; whereas petitioner's brief was presumably in preparation from December 24, 1920, when petitioner was ordered retired (if not, indeed, from December 9, when counsel first wrote to The Adjutant General) until January 29, 1921, when the argument was had.

10. Deponent therefore respectfully asks for a rule to show cause why reconsideration of all the issues herein should not be had and why the demurrer herein should not be overruled and why the petition should not be dismissed. Deponent also respectfully suggests the justice of filing no further opinion herein until the court have received such assistance as it desires.

FREDERICK M. BROWN.

Sworn to before me this 17th day of March, 1921.
[SEAL.] N. CURTIS LAMMOND,
Notary Public.

Answer to Rule to Show Cause.

Filed March 21, 1921.

* * * * * * *

Now comes the petitioner, John W. French, by his counsel, Ansell & Bailey, and in answer to the rule to show cause herein, says that the court ought not to have or take cognizance of the mat-
28 ters and things contained in said rule to show cause for the following reasons, among others:

(1) The said rule to show cause is frivolous in that it is not based upon any alleged error either of law or of fact.

(2) It offends against the established rules of practice.

(3) It does not specify any grounds in support thereof.

(4) It does not ask for the vacation of the order sustaining the demurrer.

(5) It is multifarious, inconsistent, and asks for impossible relief.

(6) It can not be granted in its entirely and therefore is bad in substance.

Further answering the petitioner says that ample time and opportunity were afforded counsel representing the Secretary of War to prepare and present argument upon the points involved in the above-entitled cause. On January 21, 1921, the rule was issued against the Secretary of War and the cause was argued fully on January 28, 1921, the court placing no limit of time upon the argument of counsel. The court at the conclusion of the oral argument fixed five days for the filing of briefs by counsel representing the respective parties. These were filed. The Secretary of War is represented by four counsel, and they were apprized as early as January 3, 1921, the date on which the suit of Colonel Creary was filed, of the issues involved in this case.

Accordingly, it is submitted that no proper grounds exist for the granting of the alleged relief sought; and petitioner prays that said rule be discharged.

ANSELL & BAILEY,
Counsel for John W. French.

Supreme Court of the District of Columbia.

Monday, March 21, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

Come now the parties hereto by their respective attorneys of record; thereupon the respondent moves the court to revoke and annul the memorandum decision made herein March 12, 1921, to reconsider all the issues herein, to overrule the petitioner's demurrer to respondent's answer, and to dismiss the petition; it is considered that said motion be, and it is hereby, overruled without prejudice.

29 *Opinion.*

Filed March 26, 1921.

* * * * * * *

This is an application for a writ of mandamus directing Hon. John W. Weeks, Secretary of War, substituted as respondent herein, to annul certain proceedings which resulted in relator being placed on the retired list of the Army and to vacate and set aside an order purporting to retire him and to restore him to his office as colonel in the Army of the United States.

The proceeding calls for a construction of section 24*b* of the act of June 4, 1920, being "An act to amend an act entitled 'An act for making further and more effectual provision for the national defense, and for other purposes,' approved June 3, 1916, and to establish military justice." A copy of the section so far as it relates to the matter in controversy is as follows:

"Sec. 24*b*. Classification of officers.—Immediately upon the passage of this act, and in September of 1921 and every year thereafter, the President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, namely: class A, consisting of officers who should be retained in the service, and class B, of officers who should not be retained in the service. Until otherwise finally classified, all officers shall be regarded as belonging to class A, and shall be promoted according to the provisions of this act to fill any vacancies which may occur prior to such final classification. No other shall be finally classified in class B until he shall have been given an opportunity to appear before a court of inquiry. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration the finding of said classification board shall be final and not subject to further revision except upon the order of the President. Whenever an officer is placed in class B, a board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct, or avoidable habits. If the finding is affirmative, he shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list with pay at the rate of 2½ per centum of his active pay multiplied by the number of complete years of commissioned service, or service which under the provisions of this act is counted as its equivalent, unless

his total commissioned service or equivalent service shall be less than ten years, in which case he shall be honorably discharged with with one year's pay."

30 The relator was placed in Class B by the classification board and thereupon at his request a court of inquiry was convened before which he appeared and was represented by military counsel. He was not furnished with a full copy of his record but with copies of the unfavorable parts of it only. He was permitted in the court of inquiry to examine all the original record of his service. The court of inquiry was of the opinion that relator should be retained in Class B, and he was so classed by the final classification board, which action was taken before receipt by the War Department from counsel for relator of a communication in which an opportunity was asked to present relator's case to the final classification board—the board to determine whether such classification was due to relator's neglect, misconduct or avoidable habits, found in the negative and he was placed on the unlimited retired list.

The relator did not have notice of the convening of the final classification board, nor of the board to determine cause, nor of the personnel of either. He was not furnished with copies of the proceedings before either board and has had no notice of such proceedings except a notice of his retirement signed by the Chief of the General Staff and countersigned by The Adjutant General.

The members of the final classification board were with one exception members of the original classification board.

The record of the proceedings was not sent to the Judge Advocate General of the Army.

None of the proceedings were laid before the President for his action, but before any action in relator's case the original respondent laid before the President the whole matter of the procedure to be followed and the action to be taken in all cases of classification and determination under the provisions of the statute and received from the President a general authority and direction to take such action in all such cases in the name of the President and by his authority by way of approval, revision, or otherwise as from the circumstances shown by the record in each such case appeared to him to be right and proper, and pursuant to such authority and direction he took the following action which was in all respects in accordance with such directions of the President:

(1) The signing on behalf and by authority of the President at the foot of the record of the final classification board, but prior to the submission of such record to the board to determine the cause of relator's classification, of the following notation: "Approved, Baker, Secretary of War."

(2) The signing on behalf and by authority of the President on December 24, 1920, subsequent to the action of the board to determine the cause of relator's classification, an instrument of approval reading:

31 "The action of the classification board in finally classifying Colonel John W. French, Infantry, in Class B, is approved by the President, and, by his direction, a board of officers having determined that such classification is not due to the officer's neglect, misconduct or avoidable habits, Colonel French is retired from active service, after twenty-two years of commissioned service, under the provisions of section 24*b* of the act of Congress approved June 4, 1920.

NEWTON D. BAKER,
Secretary of War."

(3) The issuance on December 24, 1920, by order of the respondent on behalf and by authority of the President of a special order placing relator on the retired list of the United States Army.

In an opinion in the case of United States on the relation of Creary vs. Weeks, Secretary of War, filed this day, are considered substantially all the questions raised herein with one exception and that is whether this is a proper case in which to issue a writ of mandamus.

It is argued that mandamus does not lie because the relator may try his title to the office in a suit for his salary in the Court of Claims and so has an adequate remedy other than by a writ of mandamus. While relator had no property in his office, Congress gave him a status which he is entitled to have maintained until deprived of it in the manner prescribed by Congress or until it is changed by the act of the President either alone or in conjunction with the Senate. As said in Crenshaw vs. United States, 134 U. S. 99, he enjoys a privilege revocable by the sovereignty at will.

WALTER I. McCOY,
Chief Justice.

Memorandum of Court.

Filed April 11, 1921.

* * * * * * *

Section 399 of the code is broad enough to permit the amendment of an answer to a petition for a writ of mandamus.

As this matter stands a motion should be made accompanied by the proposed answer if the respondent wishes to amend.

WALTER I. McCOY,
Chief Justice.

32 *Motion for Leave to File Answer.*

Filed April 20, 1921.

* * * * * * *

Now comes John W. Weeks appearing herein specially for the purpose of making this motion and not appearing herein otherwise and moves this court, upon his affidavit hereto annexed verified the

16th day of April, 1921, and upon all the papers and proceedings herein, for an order permitting him to file herein the answer, a copy whereof is hereto annexed.

(Signed) FREDERICK M. BROWN,
Attorney for John W. Weeks, Appearing Herein Specially.

Affidavit of John W. Weeks.

* * * * * * *

John W. Weeks being duly sworn deposes and says as follows:

1. I have to-day been informed that my name has, by order of the court, been substituted for that of Newton D. Baker as party respondent herein. I had no previous information of there being any action pending against me personally.

2. I have not been served with a summons or other process of the court herein, nor have I at any time had notice of any motion to substitute me for Newton D. Baker as the party respondent herein. I have not heretofore conferred upon anyone authority to enter my appearance or to represent me in this action or to consent to my being substituted for Newton D. Baker as the party respondent herein.

3. I am unwilling to appear voluntarily herein unless I am permitted to file the answer of which a copy is hereto annexed and made a part hereof; but I am desirous of entering a voluntary, general appearance and of being represented by the United States Attorney, in case permission to file said answer is granted by the court. I am unwilling to accept as my answer herein the answer heretofore filed herein by, and in the name of, Newton D. Baker. Should the court refuse permission to file the answer, a copy whereof is hereto annexed, my desire that I be served with such summons, process, or notice as shall be deemed appropriate to cast upon me the duties and obligations of a party respondent, in case it is intended to continue the action, and to enter final judgment therein.

4. I have authorized Frederick M. Brown, colonel, judge advocate, United States Army, to appear specially herein on my behalf in order to move for an order permitting me to file the answer,
33 a copy whereof is hereto annexed; and to stipulate that the filing of such answer shall constitute a general appearance herein.

JOHN W. WEEKS.

Sworn to before me this the 16th day of April, 1921.

[SEAL.] F. A. ALIMUTH,
Notary Public, District of Columbia.

My commission expires February 24, 1924.

Amended Answer of the Substituted Respondent, John W. Weeks, Secretary of War, to Petition for Mandamus and to Rule to Show Cause.

* * * * * * *

John W. Weeks, Secretary of War, now and at all times saving and reserving unto himself all exceptions to the imperfections, uncertainties, and defects in the petition for writ of mandamus filed herein, and reserving unto himself the benefit of the lack of jurisdiction of the court, appearing on the face of said petition, to grant the relief prayed for, and the lack of jurisdiction of the court to direct him, as Secretary of War, to perform the act in question, and relying on the same, as if demurrer had been specifically interposed, for answer to said petition, or to *do* so much thereof as is material, and to said rule to show cause says, on information and belief, as follows:

1. As to matters alleged in the first paragraph of the petition, respondent alleges that until December 23, 1920, petitioner was an Infantry officer of the Regular Army of the United States, with the rank of colonel, and that after said date petitioner has been and is a retired officer in said Army with the rank of colonel. Respondent admits the remaining matters alleged in the first paragraph of the petition.

2. As to the matters alleged in the second paragraph of the petition, respondent alleges that on the 24th day of December, 1920, an order was made which purported to place, and which actually and duly placed petitioner on the retired list, since which time petitioner has not held the office of a colonel of Infantry or enjoyed the pay, emoluments, or allowances of a colonel of infantry on the active list. Respondent admits the making of findings of moral, professional, and physical fitness upon which petitioner was appointed and commissioned first lieutenant, captain, and major of Infantry, respectively; but respondent denies the materiality of the allegation that such findings or any of them were duly or correctly made and denies any knowledge or information as to the truth and fact in that regard. Respondent alleges that the present standard of professional fitness to qualify an officer to become or to remain a
34 colonel of Infantry is very much higher than the standards of fitness which were applicable to the grades of first lieutenant, captain, and major, respectively, at the several times when findings of petitioner's professional fitness for those grades were made as aforesaid. Respondent further alleges that petitioner received a recess appointment to be a colonel of Infantry in the Regular Army on the 14th day of July, 1920, to fill a vacancy created by the act of June 4, 1920, and accepted said appointment on the 15th day of July, 1920, but that petitioner has never received a permanent appointment, or been permanently commissioned a colonel on the active list of the Regular Army, nor has petitioner at

any time been appointed as colonel on *on* the active list otherwise than as aforesaid. Respondent admits the remaining matters alleged in the second paragraph of the petition.

3. As to the matters alleged in the third paragraph of the petition, respondent alleges that petitioner's services, prior to his being placed on the retired list, were not of the required standard of efficiency and were not such as to justify the expectation that his services, if retained on the active list of the the Regular Army, would be of the standard of efficiency and professional skill required of officers of the grade of colonel of Infantry in the Regular Army. Respondent thereupon avers that petitioner's past services and his probable prospective services were not such as to justify retaining him on the active list of the officers of the United States Army under the terms of section 24*b* of the Army reorganization act of June 4, 1920. Respondent admits the remaining matters alleged in the third paragraph of the petition.

4. As to the matters alleged in the fourth paragraph of the petition, respondent admits and alleges that a court of inquiry was convened by the President to investigate the question whether petitioner should be continued in Class B and to investigate and consider, in respect of the status of petitioner, all other facts and questions which, by statute or otherwise, said court of inquiry was required or permitted to investigate or consider, and also to take testimony, collect evidence, and hear argument pertinent to said facts and questions; and respondent alleges upon information and belief that said court of inquiry actually investigated said facts and considered said questions and performed all and singular its other duties aforesaid. Respondent admits the remaining matters alleged in the fourth paragraph of the petition.

5. As to the matters alleged in the fifth paragraph of the petition, respondent alleges that in the said court of inquiry, a full copy of all unfavorable reports, notations, or papers either considered by the original classification board in petitioner's case or afterwards considered by the final classification board therein was delivered
35 to petitioner for him to retain permanently and to carry away and to become his property; and that the same were the only records upon which his provisional and final classification in Class B were based or proposed to be based. Respondent further alleges upon information and belief that in said court of inquiry a full copy of the entire record of petitioner's service as an officer of the Army from the date of his first commission therein to the date of the convening of said court was placed at petitioner's disposition or was tendered to him to examine, study, copy, and otherwise use, with full opportunity for adequate, uninterrupted, and confidential consultation with counsel with said full copy before them and that petitioner had the full, perfect, and complete use of all said records, to all intents and purposes of equal benefit and advantage to petitioner, in respect of the protection of his interests or rights as an officer on

the active list of the Regular Army, as if he had been made the sole owner and possessor thereof or a copy thereof; but that, except for the unfavorable reports, notations, and papers aforesaid, petitioner was not permitted to carry said records away or to treat them as his own property. Thereupon respondent avers that petitioner had been furnished with a full copy of all official records relating to his services, within the intent and meaning of the statute aforesaid. Respondent further alleges that no demand for the furnishing to him of other or more complete records, documents, or papers or copies thereof was made by or on behalf of petitioner in the court of inquiry; nor was any protest or objection to the sufficiency of the records, documents and papers that were actually furnished to him made by, or on behalf of the petitioner in said court of inquiry, nor has any such demand, protest, or objection been made at any time before the institution of the action herein. Respondent further avers that the mandate and requirements of said statute have been, in all respects, complied with and carried into effect and that the proceedings mentioned in the fifth paragraph of the petition are valid and effectual. Respondent denies the remaining matters alleged in the fifth paragraph of the petition.

6. As to the matters alleged in the sixth paragraph of the petition, respondent admits the receipt in due course by The Adjutant General of the Army of the letter which petitioner's counsel addressed to him December 9, 1920, and the sending of his reply of December 14, 1920; the terms of which letter and reply are correctly set forth in the petition. Respondent alleges that, as stated in said letter of The Adjutant General, petitioner's case had at that time been considered and determined by the final classification board. As to the remaining matters alleged in said sixth paragraph of the petition, respondent has no knowledge nor any information sufficient to form a belief and demands strict proof thereof, if material.

36 7. As to the matters alleged in the seventh paragraph of the petition, respondent admits and alleges the sending to and receiving by petitioner of a copy of Special Order No. 302-0, December 24, 1920, a correct copy whereof is set forth in the seventh paragraph of the petition. He admits and alleges that a final classification board was convened and considered petitioner's case and that said board, upon reconsideration, made a finding placing petitioner in class B. Unless in virtue of an affirmative election by the President to intervene and order a revision, respondent avers that said finding, under the terms of section 24*b* aforesaid, was final and not subject to further revision and that, for want of such intervention and order, said finding became and was final and not subject to revision. Respondent denies that the original respondent herein directed or influenced by order or otherwise the finding, conclusion, or decision of the final classification board; but he admits that said original respondent made the other orders, granted the approvals, and did the acts alleged in the seventh paragraph of the petition to have been made, granted, and done by him. Respondent

denies that there was anything unlawful or improper in said orders, approvals, or acts, denies that they or any of them were null and void and denies all and singular the remaining allegations contained in the seventh paragraph of the petition. Further answering, respondent alleges that the appointment or assignment to duty of officers to compose the provisional classification board, the final classification board, and the board to determine whether officers classified in class B are classified because of neglect, misconduct, or avoidable habits under the terms of section 24*b* aforesaid, and the convening thereof were made and ordered in accordance with orders annexed to the original answer herein, marked, respectively, Exhibits 1, 2*a*, 2*b*, 2*c*, 2*d*, and 2*e*, 3, 4, and 5, and made a part of this amended answer.

8. As to the matters alleged in the eighth paragraph of the petition, respondent admits and alleges that the proceedings actually conducted by or in the presence of the final classification board and of the board to determine the cause of classification were private, that no notice was given petitioner of the convening of either or of the personnel of said boards, or of the time when his case would be considered by either, but respondent denies that no opportunity was afforded plaintiff to be heard before either of said boards. Respondent alleges upon information and belief that until, and except for the sending of the letter, a copy whereof marked Exhibit A is annexed to the petition, petitioner asked no opportunity to be heard in the actual presence of said boards, or either of them, but that petitioner's case was duly presented to each of those boards and hearings were granted to petitioner and were had by said
37 boards, respectively, in that the testimony, statements, and evidence adduced by plaintiff and on his behalf in the court of inquiry, together with a copy of all other proceedings in the court of inquiry in petitioner's case, were submitted to and considered by each of said boards. Respondent has no knowledge of any copies furnished or information given to petitioner in respect of proceedings or action taken before, or by the final classification board, the board to determine the cause of classification in Class B, or the original respondent herein, except the information furnished in The Adjutant General's letter of December 14, 1920, and in the copy of Special Order No. 302-O, December 24, 1920, sent to petitioner as aforesaid and except that petitioner was duly and seasonably furnished a copy of all proceedings had in the actual presence of the court of inquiry. Respondent therefore admits that petitioner received no other copies or information than as aforesaid. Respondent alleges that neither he nor the original respondent herein has taken any action preventing or hindering petitioner from petitioning the President for an order in revision of the proceedings of said final classification board. Respondent admits that the final classification board which finally classified plaintiff in Class B was the same board and composed of the same officers as the preliminary classification board, which provisionally classified him in Class B,

except that after said provisional classification and before said final classification of petitioner, one officer was relieved and another was substituted for him as is more particularly shown by Exhibits 1 and 2 attached to the original answers herein and hereinbefore referred to, but defendant denies that the members of said boards were biased, prejudiced, or incompetent to give petitioner's classification fair and impartial consideration, and avers that they did give it such consideration. Respondent denies all and singular the remaining matters alleged in the eighth paragraph of the petition.

9. As to the matters alleged in the ninth paragraph of the petition, respondent admits that neither he nor the original respondent herein has caused the record of the proceedings of said court of inquiry to be transmitted to the Judge Advocate General or to the President, and he admits that said record has not yet been reviewed, considered, or acted upon by the Judge Advocate General or personally by the President. Respondent alleges that, prior to any determination or classification in petitioner's case, the original respondent laid before the President the whole matter of procedure to be followed and the action to be taken in all cases of classification and determination under the provisions of sections 24*b*, and he received from the President general instructions, directions, and authority in substance and to the effect that, except as to cases wherein he, the said Secretary of War, should at any time conclude that personal attention and
38 consideration by the President ought to be had in virtue of the importance of the matter or for any other reason, the said Secretary of War should take such action in the name of the President and by his authority by way of approval, revision, or otherwise as from the circumstances shown by the record in each such case appeared to him, the said Secretary of War, to be right and proper. Pursuant to such authority and directions so received by him from the President he, as Secretary of War, after due consideration, concluded that the case of the petitioner herein did not by reason of its importance or for any other reason, merit the personal attention and consideration of the President. The said Secretary of War thereupon took the following action, which was in all respects in accordance with such directions of the President.

(1) The signing by said original respondent, on behalf and by authority of the President, at the foot of the record of the final classification board, but prior to the submission of such record to the board to determine the cause of petitioner's classification, of the following notation: "Approved: Baker, Secretary of War."

(2) The signing by said original respondent on behalf and by authority of the President on December 24, 1920, subsequent to the action of the board to determine the cause of petitioner's classification, of an instrument of approval, a copy of which is annexed to the original answer, marked Exhibit 6 and made a part of this annexed answer.

(3) The issuance on December 24, 1920, of Special Order No. 302-O placing petitioner on the retired list of the United States Army, of which a true copy is set forth in the seventh paragraph of the petition. Respondent denies the remaining matters alleged in the ninth paragraph of the petition.

10. Respondent denies all and singular the several allegations contained in the tenth paragraph of the petition. In respect thereof, the truth and fact are as follows: In accordance with section 24*b* of the act of June 3, 1916, as amended June 4, 1920 (41 Stat., 759, 773), and immediately upon the passage of the act of June 4, 1920, the President convened a board of not less than five general officers, shown by Exhibit 1 annexed to the original answer herein and made a part hereof, which board has been since its appointment and is now engaged in arranging all officers of the Army in two classes, namely, in Class A, consisting of officers who should be retained in the service, and in Class B, consisting of officers who should not be retained in the service. Said board in accordance with said statute provisionally arranged petitioner in Class B, whereupon petitioner requested that a court of inquiry be convened before which he might be given an opportunity to appear; and accordingly a court of inquiry was convened at Fort Sam Houston, Texas, before
39 which petitioner appeared in person and by counsel. In such court petitioner was furnished with a full copy of the official records upon which his proposed classification was based, as has been more fully set out in paragraph 5 hereof, and was given by and before said board full and free opportunity to present the testimony of himself and of others in his behalf and to be heard fully, of which opportunities he availed himself. The record of such court of inquiry was forwarded to the final classification board for reconsideration of petitioner's case. After such consideration, the final classification board placed petitioner in Class B, which action was approved, as more particularly set forth in paragraph 9 hereof; and the President has not ordered further revision of said finding of said classification board. After petitioner had been placed in Class B as aforesaid, a board of three officers was convened to determine whether such classification was due to his neglect, misconduct, or avoidable habits, as more particularly set forth in paragraph 7 hereof and shown by Exhibits 3, 4 annexed to the original answer herein and made a part hereof. The finding of said board was negative, and thereafter on December 24, 1920, by the order, a copy of which, marked "Exhibit 7," is annexed to the original answer herein and made a part hereof, petitioner was placed upon the retired list of the Army in accordance with the statute hereinbefore cited and in all respects as provided by law.

Wherefore, having fully answered the allegations of the petition herein, so far as he is advised by counsel that it is necessary for him to answer, and having shown cause why the writ of mandamus should not issue against him as prayed in said petition, this respondent

prays that he may hence be dismissed with his reasonable costs in this behalf sustained.

(Signed) JOHN W. WEEKS,
Secretary of War.

____ ____,
Attorney for the United States in and for the District of Columbia.

____ ____,
Assistant Attorney for the United States in and for the District of Columbia.

____ ____,
Judge Advocate, U. S. Army, Of Counsel for the Defendant.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof; and that the state-
40 ments of fact therein made as upon personal knowledge are true, and those made as upon information and belief I believe to be true.

(Signed) JOHN W. WEEKS.

Subscribed and sworn to before me this 16th day of April, 1921.
F. A. ALLMUTH,
Notary Public, District of Columbia.

My commission expires Feb. 24, 1924.

Notice.

* * * * * * *

Messrs. Ansell & Bailey,
Attorneys for Petitioner:

Take notice that the aforegoing motion will be for hearing *at* on the 22*st* day of April, 1921, at 10 a. m. in open court.

Washington, April 18, 1921.

(Signed) FREDERICK M. BROWN,
Attorney for John W. Weeks, Appearing Herein Specially.

Memorandum of Court.

Filed May 23, 1921, as of April 22, 1921.

* * * * * * *

A motion was made upon the affidavit of the respondent verified April 16, 1921, and upon all the papers and proceedings herein for an order permitting him to file an answer. The notice of motion reads

in part "Now comes John W. Weeks appearing herein specially for the purpose of making this motion and not appearing otherwise, etc." The court declined to entertain the motion because of the form of the appearance.

WALTER I. McCOY,
Chief Justice.

Supreme Court of the District of Columbia.

Friday, April 22d, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

Upon consideration of the motion of John W. Weeks, Secretary of War, respondent, filed herein April 20, 1921, by his attorney, for an order permitting him to file herein the amended answer accompanying said motion, it is ordered that the same be, and hereby is, denied.

41 *Motion to Dismiss.*

Filed April 23, 1921.

* * * * * * *

Now comes John W. Weeks, appearing herein specially for the purpose of making this motion and not appearing herein otherwise and moves this court, upon his affidavit verified the 16th day of April, 1921, which affidavit is filed with a motion herein that was heard before, and determined by this court on the 22nd day of April, 1921, and upon all the papers and proceedings herein, for an order dismissing this action by reason of petitioner's failure to apply for, or to cause the service of any process or order upon the substituted defendant to the end that he may be brought within the power and authority of the court for the purposes set forth in the petition herein, and by reason of petitioner's failure to serve notice upon said substituted defendant with like purpose, and by reason of the court's having failed to acquire jurisdiction over the person of said substituted defendant, and for such other relief predicated upon the defects aforesaid as may be just.

(Signed) FREDERICK M. BROWN,
Attorney for John W. Weeks,
Appearing Herein Specially.

Notice.

* * * * * * *

Messrs. Ansell & Bailey,
Attorneys for Petitioner:

Take notice that the foregoing motion will be for hearing on the 29th day of April, 1921, at 10 a. m., before his honor, Chief Justice McCoy.

Washington, April 23, 1921.

(Signed) FREDERICK M. BROWN,
Attorney for John W. Weeks,
Appearing Herein Specially.

Proposed Rule to Show Cause.

* * * * * * *

On reading and filing the annexed affidavit of Frederick M. Brown, verified the 23rd day of April, 1921, it is

Ordered that petitioner show cause before me in open court on the 29th day of April, 1921, why the substituted defendant should not have leave to file such answer herein as is referred to in said affidavit or such other answer or amended answer as the interests of justice require.

42 And it is further ordered that neither the procuring of this order nor the argument and submission of the question aforesaid shall be deemed to constitute a general appearance of the substituted defendant or a waiver of the special appearance under which said defendant has noticed for hearing and intends to submit for determination a motion to dismiss the petition for want of jurisdiction of the person of the party defendant; provided, nevertheless, that nothing in this order contained shall be deemed to affect petitioner's right to cause the continued pendency of this application for leave to file a new answer, after a decision denying said motion to dismiss, or the filing of a new answer if such leave be granted, to be held and treated by the court as a general appearance herein, in case petitioner has such right under the law and according to the principles of justice. And it is

Further ordered that service of a copy of this order upon the attorneys for the petitioner if made on or before the — day of April, 1921, shall be sufficient.

____ ____,
Chief Justice Supreme Court.

Fiat of Chief Justice McCoy.

Refused:

WALTER I. McCOY,
Chief Justice.

Affidavit of Frederick M. Brown.

Filed April 25, 1921.

* * * * * * *

Frederick M. Brown being duly sworn, deposes and say as follows:

1. By direction of John W. Weeks, the substituted defendant herein, I have today filed in the office of the clerk of this court a motion to dismiss the petition herein by reason of failure to obtain jurisdiction of the person of the substituted party defendant, appearing specially for the purpose of said motion; and I have caused notice of hearing of said motion for April 29, 1921, to be served on petitioner's attorneys.

2. Subsequent to the filing of said motion, I have been directed by the substituted defendant herein that, if said motion to dismiss shall be denied on the ground that in the view taken by the court, it already has jurisdiction of the person of the substituted party defendant, a motion or application shall be made for an order granting leave to file the answer a copy whereof was annexed to the motion made and decided herein April 22, 1921, except that a first page, a copy whereof is hereto annexed, is to be substituted for the first page of the above-mentioned answer. And for the purpose of mak-
43 ing said last-mentioned motion or application, I have been authorized to enter, immediately after the denying of the motion to dismiss on the ground aforesaid, if said motion shall in fact be denied, such appearance as shall be necessary to enable the motion or application aforesaid for leave to file a new answer or an amended answer to be heard and determined on the merits, including a general appearance on behalf of the substituted party defendant in case the court refuses to hear and determine said motion otherwise.

3. The new answer which it is desired to file has been read over in my presence to Newton D. Baker, the original defendant herein, and he expressed to me his approval thereof in substance and form and as to the correctness and accuracy of the allegations of fact contained in it.

4. I desire to obtain an order granting leave to file a new answer in accordance with the authority and directions aforesaid. Great confusion and embar-assment have, however, resulted to the War Department and to the Army owing to the pendency of this action. By reason of this action, all promotions to commissioned office-s in the Army in the grade of colonel and in grades inferior thereto are being delayed, hampered, and limited, if not entirely prevented. In order to diminish as much as possible the duration of the pendency of this litigation, I desire that argument upon both the questions aforesaid (in so far as further argument is asked for or permitted) shall be had at the same time, to wit, on April 29, 1921, the next motion day.

5. In order to make it clear that the substituted defendant insists upon his special appearance until after his motion to dismiss shall be denied (if, indeed, it shall be denied), I feel that an order to show cause of the nature herewith submitted in necessary.

FREDERICK M. BROWN.

Sworn to before me this the 23rd day of April, 1921.

[SEAL.] N. CURTIS LAMMOND,
Notary Public.

In the Supreme Court of the District of Columbia.

At Law.

No. 65058.

THE UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH, Petitioner,

v.

JOHN W. WEEKS, Secretary of War, Respondent.

Answer of the Respondent, John W. Weeks, Secretary of War, to Petition for Mandamus and to Rule to Show Cause.

John W. Weeks, Secretary of War, now and at all times saving and reserving unto himself all exceptions to the imperfections,
44 uncertainties and defects in the petition for writ of mandamus filed herein, and reserving unto himself the benefit of the lack of jurisdiction of the court, appearing on the face of said petition, to grant the relief prayed for, and the lack of jurisdiction of the court of and over the person of the above named party defendant herein and also the lack of jurisdiction of the court to direct him, as Secretary of War, to perform the act in question, and relying on the same for all purposes and also in like manner as if demurrer had been specifically interposed, for answer to said petition, or to *do* so much thereof as is material, and to said rule to show cause says, on information and belief, as follows:

1. As to the matters alleged in the first paragraph of the petition, respondent alleges that until December 23, 1920, petitioner was an Infantry officer of the Regular Army of the United States, with the rank of colonel and that after said date petitioner has been and is a retired officer in said Army with rank of colonel. Respondent admits the remaining matters alleged in the first paragraph of the petition.

2. As to the matters alleged in the second paragraph of the petition, respondent alleges that on the 24th day of December, 1920, an order was made which purported to place, and which actually and duly placed petitioner on the retired list, since which time petitioner has not held the office of a —.

1.

Affidavit in Opposition to Motion Filed Herein April 23, 1921, to Dismiss the Above-entitled Cause.

Filed April 29, 1921.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a notary public in and for the District of Columbia, Edward S. Bailey, who, being first duly sworn, deposes and says that he is one of the counsel of record for the petitioner in the above-entitled cause. Affiant says:

(*a*) That the record shows that on January 21, 1921, the United States Attorney entered his appearance for the then defendant, Newton D. Baker, Secretary of War, and that at the hearing on the demurrer to the answer of the then said defendant, L. H. Vandoren, esq., an assistant United States attorney, representing the said United States attorney, Frederick M. Brown, colonel, judge advocate, United States Army, and W. A. Graham, lieutenant colonel, judge advocate, United States Army, appeared and argued the cause on behalf of the said Newton D. Baker.

45 (*b*) On, to wit, the 10th day of March, 1921, affiant presented an order to substitute respondent John W. Weeks, Secretary of War, in lieu of Newton D. Baker, whose term of office had expired as such Secretary, as party defendant, to the said L. H. Vandoren, esq., the assistant United States attorney having charge of the case in the office of the United States attorney, who noted upon said order of substitution his consent thereto; and that thereupon affiant in open court presented the said order to Mr. Chief Justice McCoy, who signed the same on the said 10th day of March, 1921, substituting the said John W. Weeks, the Secretary of War, as party defendant in lieu of the said Newton D. Baker.

(*c*) On the 12th day of March, 1921, the demurrer to the answer filed by the said Baker was sustained by the court.

(*d*) On the 14th day of March, 1921, affiant presented to Mr. Chief Justice McCoy, in open court, an order asking the court to issue the writ of mandamus in said cause, and the said Frederick M. Brown, colonel, judge advocate, appeared and, purporting to represent the respondent, opposed generally the issuance of said writ of mandamus.

(*e*) Thereafter, to wit, before the 18th day of March, 1921, the said Frederick M. Brown, colonel, judge advocate, purporting to represent the respondent John W. Weeks, generally filed with the court a printed brief upon the questions involved in this cause; on the title page of said brief appear the names of John E. Laskey, United States attorney, Frederick M. Brown, colonel, judge advocate,

United States Army, Lucien H. Vandoren, assistant United States attorney, W. A. Graham, Lieutenant colonel, judge advocate, United States Army, and Archibald King, major, judge advocate, United States Army, as counsel.

(*f*) On the 18th day of March, 1921, the said Frederick M. Brown, purporting to represent as counsel the said respondent John W. Weeks, presented a rule to show cause to this court, together with an affidavit executed by him, and secured a rule from the court directing the petitioner herein to show cause why the memorandum decision of the court made in said cause on March 12, 1921, should not be revoked and annulled and why reconsideration of all the issues in said cause should not be had, and why petitioner's demurrer to the answer should not be overruled and why the petition should not be dismissed. Copies of said motion and rule to show cause and affidavit are hereto attached and made a part hereof.

(*g*) About the 1st day of April, 1921, the said Frederick M. Brown, purporting to represent generally the respondent John W. Weeks, Secretary of War, as counsel, presented a motion to Mr. Chief Justice McCoy, a copy of which is hereto attached, which said motion was argued by the said Frederick M. Brown on be-
46 half of the said John W. Weeks before Mr. Chief Justice McCoy, and the said L. H. Vandoren, W. A. Graham, and Archibald King were present, with the said Frederick M. Brown, at the argument thereof; and on the 12th day of April, 1921, the said Frederick M. Brown filed a memorandum of authorities with Mr. Chief Justice McCoy in support of said motion, which said memorandum applied also to a similar motion in the Creary case.

Affiant further says that notwithstanding the said order substituting the said John W. Weeks as defendant herein and the said general appearance by the said Frederick M. Brown, colonel, judge advocate, on behalf of the respondent, John W. Weeks, and the initiating by him of the motions or proceedings as aforesaid as counsel for and on behalf of the said John W. Weeks and the occupying of the time and attention of the court in the presentation and argument of the said motions and proceedings, purporting as aforesaid to represent as counsel generally the said respondent, John W. Weeks, Secretary of War, the said Frederick M. Brown nevertheless on April 20, 1921, undertook to enter a special appearance for the respondent and to move the court for leave to file an answer for and on behalf of the said John W. Weeks, which said motion was denied. Notwithstanding all of the foregoing, the said Frederick M. Brown, on the 23d day of April, 1921, purporting to appear specially for the said defendant, the Secretary of War, signed and filed in this court an instrument in writing moving the court to pass an order "dismissing this action by reason of petitioner's failure to apply for or cause the service of any process or order upon the substituted defendant," and claiming that the said John W. Weeks, Secretary of War, is not a party to this cause.

Affiant further says that the record of the court and the papers

filed in this cause show that on April 25, 1921, said Frederick M. Brown presented an oral motion to Mr. Chief Justice McCoy asking the court to issue a rule directing that petitioner show cause why the substituted defendant should not have the leave to file such answer herein as referred to in the affidavit made by the said Frederick M. Brown attached to the proposed rule to show cause, copies of which are hereto attached and made a part hereof. The record shows that this oral motion was denied.

EDWARD S. BAILEY.

Subscribed and sworn to before me this 28th day of April, 1921.

T. C. MEIDINGER,
Notary Public.

[SEAL.]

47 In the Supreme Court of the District of Columbia.

At Law.

No. 65058.

UNITED STATES OF AMERICA ex Rel. JOHN W. FRENCH, Petitioner,

vs.

JOHN W. WEEKS, Secretary of War, Respondent.

Rule to Show Cause.

On reading the annexed affidavit of Frederick M. Brown verified the 17th day of March 1921, it is

Ordered that the petitioner herein show cause before this court on the 21st day of March, 1921, at ten o'clock in the forenoon of that day why the memorandum decision made herein March 12, 1921, should not be revoked and annulled and why reconsideration of all the issues herein should not be had and why petitioner's demurrer to the answer herein should not be overruled and why the petition herein should not be dismissed. And it is

Further ordered that service of a copy of this rule, if made on petitioner's attorneys on or before the 19th day of March, 1921, shall be sufficient.

Washington, March 18, 1921.

WALTER F. McCOY,
Chief Justice Supreme Court.

In the Supreme Court of the District of Columbia.

At Law.

No. 65058.

THE UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH, Petitioner,

vs.

NEWTON D. BAKER, Secretary of War, Respondent.

Frederick M. Brown, being duly sworn deposes and says:

1. Deponent is of counsel for respondent in the above entitled cause and has had the primary responsibility for the presentation thereof subject to the direction of the Judge Advocate General. He was not assigned to that duty until on or about January 27, 1921.

2. Upon the original argument, January 29, 1921, of petitioner's demurrer to respondent's answer, deponent asked for two weeks' time for the preparation of a brief. Upon request by petitioner's counsel, however, the court fixed five days as the time for said purpose; whereupon deponent stated that he would be unable, within that time to prepare an adequate brief, that he would file such
18 brief as the time fixed permitted, that he would thereafter prepare such a brief as he felt the case demanded, and that he hoped to be able to obtain leave to submit the same when prepared, to this court.

3. Deponent submitted, prior to the expiration of the five-day period aforesaid, such a brief as it was possible for him to prepare, consistently with his other duties. Said brief was nevertheless wholly inadequate to meet the issues in this case and entirely insufficient to constitute proper assistance to the court in a case involving a highly important feature of a new statute creating a permanent system for the organization and administration of the Army; a statute which has not, prior to this case, received judicial consideration.

4. Preparation by deponent of the intended brief was greatly interfered with (1) by being required to give legal assistance to the Secretary of War in a considerable number of other cases in which action by him before the expiration of his term of office, March 4, 1921, was deemed necessary and (2) in consequence of the grave and critical illness of deponent's wife. Deponent's draft of said brief was therefore not completed until March 5, 1921; and the printing thereof at the Government Printing Office was not completed until March 16, 1921.

5. A memorandum decision was made by this court March 12, 1921, to the effect that the answer was deemed demurrable because

it failed to show that the President of the United States had given personal consideration to the matter of eliminating Colonel French and it showed in fact that he had not done so.

6. Deponent conceives that said decision was made under the pressure of apprehension lest on the afternoon of said March 12, the Senate might confirm an officer to the office otherwise held by Col. French and that petitioner might through delay lose the benefit of any order or judgment to which the petitioner might be entitled (Blake v. U. S., 103 U. S. 227). In deponent's opinion, several vital considerations were overlooked by the court in making said decision:

(1) The court appears to have misunderstood the Runkle case (122 U. S. 543). Chief Justice Waite, in limiting its doctrine to "proceedings judicial in character" (122 U. S. at 557), manifestly meant to refer to proceedings which are entirely judicial and did not include quasi judicial proceedings which are partly administrative (Orchard v, Alexander, 157 U. S. 372, 379). This is apparent from the entire context of the Runkle opinion and particularly from his unequivocal statement that he was dealing with proceedings that were judicial and "not administrative" (122 U. S. at 557).

(2) The Runkle doctrine has never been applied to quasi judicial or administrative determinations which the President is re-
49 quired to make: This is an extraordinary fact, if petitioner's contention is sound. On the contrary, the President's determinations of this nature have regularly been held to have been properly made for him by the heads of departments under power actually or presumptively delegated to them by him. Deponent feels that this court has overlooked the controlling effect upon this case of U. S. v. Chicago M. & St. P. Railway, 218 U. S. 233, which holds that a quasi judicial determination required by the swamp lands act of Sept. 28, 1850 (9 Stat. 519) to be made by the Secretary of the Interior may effectively be delegated by him to the Commissioner of the General Land Office. Apparently the court supposed that in making determinations required by the swamp lands act, the Commissioner was directly empowered to act. This would not be so unless the act of March 3, 1872 (17 Stat. 37) may be regarded as transferring to the Commissioner the Secretary's duty, under the 1850 act, of determining the character of the lands. As repeals by implication are not favored (Henrietta Mining Co. v. Gardner, 173 U. S. 123, 128) and as effect may be given to both acts by assuming that Congress intended the Commissioner's action under the act of 1872 to be advisory to the Secretary, it follows that in according finality to the Commissioner's decision, a delegation to him of the Secretary's powers under the act of 1850 is necessarily involved. Clearly this was the view of Mr. Justice Harlan, who, with reference to all the provisions of statute down to 1910, regarded the scheme of Congress as conferring "upon the Secretary of the Interior and upon him alone, the power to identify particular lands as swamp and overflowed lands embraced by the act of 1850." (218 U. S. at 242.) And Mr. Justice Harlan, had he looked upon the Commissioner as

having succeeded, in virtue of amendment to the act of 1850, to the power of the Secretary to determine the character of the lands, would not have been guilty of the folly of asserting that the Commissioner's decision, Oct. 21, 1876, "was in contemplation of law one by the Secretary of the Interior" (218 U. S. at 243) or of invoking the doctrine in Wilcox v. Jackson, Wolsey v. Chapman, French v. Fyan, and Ehrhardt v. Hogaboom. That the determination was quasi judicial is equally indisputable. (Brief, page 107.)

(3) The court appears also to have overlooked the controlling effect upon this case of Stapleton v. Duell, 17 App. D. C. 575, 583, in which the statutory power (R. S. 4910) of deciding appeals as to which alleged inventor is entitled to a patent for the invention is held delegable by the Commissioner of Patents to the Assistant Commissioner. That the deciding of the appeal was a quasi judicial act is, of course, clear. (See brief, pp. 99-102.)

50 (4) The court appears to have failed to give due effect to R. S. 216, which, properly construed, authorizes the President to delegate to the Secretary of War the making of any determination incident to the administration of the War Department (brief, p. 102). The language used by Congress in R. S. 216 in authorizing the President to delegate his quasi judicial and other administrative functions to the Secretary of War is practically identical with the statutory language relied on in Stapleton v. Duell, 17 App. D. C. 575, 583, as authoizing the Commissioner of Patents to delegate his quasi judicial functions to the Assistant Commissioner. The act of June 4, 1920, and R. S. 216 ought to be harmonized.

(5) The court appears to have failed to give due weight to the fact that the elimination of Army officers involves no judicial act whatever. Section 24*b* is not penal, nor does carrying it into execution ever deprive a man of a property right (brief, pp. 90, 91, 73, 74, 77, 34, 47, 49). It follows that the French case is ruled by Williams v. U. S., 1 How. 290 (brief, 92-98), which involved a purely administrative determination, rather than by U. S. v. Chic. M. & St. P. Ry., 218 U. S. 233, which involved a quasi judicial determination. It matters not, of course, which of the two cases is exactly applicable; the result is the same under either.

(6) The court has apparently been misled into supposing that in the legislative history of the act of June 4, 1920, any just support is found for attributing to Congress the intent to compel the President in every case of elimination under section 24*b* to bestow upon the proceedings his personal attention and consideration.

7. On March 15, 1921, immediately upon learning that deponent's said brief would be ready within a few hours, deponent called at the office of petitioner's counsel and saw both of them. He notified them of his purpose to apply, by rule to show cause, for a reconsideration of all the issues herein, especially that of the President's right to delegate any duty under section 24*b*, and asked them to suggest

what time they desired in order to meet the points presented by deponent's said brief and to draft such reply thereto as they might desire to present to the court, and, in any event, on what day or after what interval they desired the rule made returnable. They both refused to give any information concerning their attitude or desires. Deponent thereupon stated that he was considering asking this court to fix either March 19 or March 26 as the return day, and asked whether they cared to criticize this plan as giving too much time or too little time. This request for information was also refused.

Deponent listened today to statement by petitioner's counsel in the presence of the court as to how busy they were and how formi-
dable deponent's brief which had been handed to them ap-
51 peared to be. In view of these statements, deponent respectfully suggests fixing April 2 as the return day in case the rule to show cause be granted.

8. The U. S. Senate has adjourned without taking action on any nomination that might interfere with either of the pending cases. Announcement has been made that it will not meet again until April 11, 1921.

9. Petitioner's counsel were understood as urging to-day in effect that a written opinion be handed down by the court immediately and without delaying to read deponent's present brief. Counsel stated that it would probably take them at least ten days to read the brief; presumably their view would be that the court, with its pressing duties and engagements, would require at least as long. The course referred to, if adopted by the court, would involve obvious injustice. The only brief for respondent in this case, of which the court has hitherto had the benefit, was a hastily prepared and wholly inadequate document; whereas petitioner's brief was presumably in preparation from December 24, 1920, when petitioner was ordered retired (if not, indeed, from December 9, when counsel first wrote to The Adjutant General) until January 29, 1921, when the argument was had.

10. Deponent therefore respectfully asks for a rule to show cause why reconsideration of all the issues herein should not be had and why the demurrer herein should not be overruled and why the petition should not be dismissed. Deponent also respectfully suggests the justice of filing no further opinion herein until the court have received such assistance as it desires.

(Signed) FREDERICK M. BROWN.

Sworn to before me this 17th day of March, 1921.
[SEAL.] N. CURTIS LAMMOND,
Notary Public.

In the Supreme Court of the District of Columbia.

At Law.

No. 65058.

UNITED STATES OF AMERICA ex Rel. JOHN W. FRENCH, Petitioner,

vs.

JOHN W. WEEKS, SECRETARY OF WAR, Respondent.

The demurrer to the answer herein having been argued and submitted and due consideration having been had, it is ordered that the said demurrer be, and the same hereby, is sustained with leave to respondent, within ten days after date hereof, to amend said answer or to file an amended answer herein.

Washington, March —, 1921.

____ ____,

Chief Justice Supreme Court.

52 In the Supreme Court of the District of Columbia.

At Law.

No. 64936.

UNITED STATES OF AMERICA ex Relatione WM. F. CREARY, Petitioner,

vs.

JOHN W. WEEKS, Secretary of War, Defendant.

On reading and filing the annexed affidavit of Frederick M. Brown, verified the 23d day of April, 1921, it is

Ordered that petitioner show cause before me in open court on the 29th day of April, 1921, why the substituted defendant should not have the leave to file such answer herein as is referred to in said affidavit, or such other answer or amended answer as the interests of justice require. And it is further ordered that neither the procuring of this order nor the argument and submission of the questions aforesaid shall be deemed to constitute a general appearance of the substituted defendant or a waiver of the special appearance under which said defendant has notice for hearing and intends to submit for determination a motion to dismiss the petition for want of jurisdiction of the person of the party defendant; provided, nevertheless, that nothing in this order contained shall be deemed to affect petitioner's right to cause the continued pendency of this application for leave to file a new answer after a decision denying said motion to dismiss, or the filing of a new answer if such leave be granted, to be held and treated by the court as a general appearance and hearing, in case the petitioner has such right under the law and according to the

principles of justice. And it is further ordered that service of a copy of this order upon the attorneys for the petitioner, if made on or before the — day of April, 1921, shall be sufficient.

Chief Justice Supreme Court.

In the Supreme Court of the District of Columbia.

At Law.

No. 64936.

UNITED STATES OF AMERICA ex Relatione WM. F. CREARY, Petitioner,

v.

JOHN W. WEEKS, Secretary of War, Defendant.

Frederick M. Brown, being duly sworn, deposes and says as follows:

1. By direction of John W. Weeks, the substituted defendant herein, I have to-day filed in the office of the clerk of this court a motion to dismiss the petition herein by reason of failure to obtain jurisdiction of the person of the substituted party defendant
53 appearing specially for the purpose of said motion; and I have caused notice of hearing of said motion for April 29, 1921, to be served on petitioner's attorneys.

2. Subsequent to the filing of said motion I have been directed by the substituted defendant herein that if said motion to dismiss shall be denied on the ground that, in the view taken by the court, it already has jurisdiction of the person of the substituted party defendant, a motion or application shall be made for an order granting leave to file the answer, a copy whereof was annexed to the motion made and decided herein April 22, 1921, except that a first page, a copy whereof is hereto annexed, is to be substituted for the first page of the above mentioned answer. And for the purpose of making said last mentioned motion or application, I have been authorized to enter, immediately after the denying of the motion to dismiss on the ground aforesaid, if said motion shall in fact be denied, such appearance as shall be necessary to enable the motion of application aforesaid for leave to file a new answer or an amended answer to be heard and determined on the merits, including a general appearance on behalf of the substituted party defendant in case the court refuses to hear and determine said motion otherwise.

3. The new answer which is desired to be filed has been read over in my presence by Newton D. Baker, the original defendant herein, and he expressed to me his approval thereof in substance and form, and as to the correctness and accuracy of the allegations of fact contained in it.

4. I desire to obtain an order granting leave to file a new answer in accordance with the authority and directions aforesaid. Great

confusion and embarrassment have, however, resulted to the War Department and to the Army owing to the pendency of this action. By reason of this action, all promotions of commissioned officers in the Army in the grade of colonel and in grades inferior thereto are being delayed, hampered, and limited, if not entirely prevented. In order to diminish as much as possible the duration of the pendency of this litigation, I desire that argument upon both the questions aforesaid (in so far as farther argument is asked for or permitted) shall be at the same time, to wit, on April 29, 1921, the next motion day.

5. In order to make it clear that the substituted defendant insists upon his special appearance until after his motion to dismiss shall be denied (if, indeed, it shall be denied), I feel that an order to show cause of the nature hereof submitted is necessary.

FREDERICK M. BROWN.

Sworn to before me this the 23d day of April, 1921.

M. CURTIS LAMMOND,
Notary Public.

54 Supreme Court of the District of Columbia.

Friday, April 29, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy, presiding.

* * * * * * *

Upon consideration of the motion of respondent filed herein April 23, 1921, to dismiss this action, it is ordered that said motion be, and it is hereby, overruled.

This cause coming on to be heard upon the petition, the answer and demurrer thereto, and after argument of counsel, and the cause being submitted to and considered by the court, and the court having sustained the demurrer on the 12th day of March, A. D. 1921.

It is by the court this 29th day of April, 1921, ordered that the writ of mandamus forthwith issue against John W. Weeks, Secretary of War of the United States, as prayed for in the petition herein, commanding him to vacate and set aside the order dated the 24th day of December, 1920, purporting to retire the relator John W. French, from active service in the United States Army, and to restore the said relator John W. French to the office and status of colonel of Infantry in the Army of the United States as of the 24th day of December, 1920, the date of the said order purporting to retire him from active service from said office and from the Army of the United States, and to the rights incident and belonging to said office and status of which he was deprived by said order.

From the foregoing order the respondent by his attorney in open court notes an appeal to the Court of Appeals of the District of Columbia.

Motion to Correct Record and to Vacate Final Judgment.

Filed May 3, 1921.

* * * * * * *

Now comes John W. Weeks, making such appearance herein as this motion justly implies, and upon the affidavit of Frederick M. Brown verified May 3, 1921, hereto annexed and marked Exhibit A, and upon the other papers hereto annexed, which papers are mentioned and described in paragraphs 2 and 6 of said affidavit and marked Exhibits B, C, D, E, F, G, and H, respectively, and upon all the papers and proceedings herein, moves this court for an order or for orders granting defendant relief as follows:

1. That the records of this court be amended, supplemented, and corrected so as to show the true nature of its proceedings in that on the 22nd day of April, 1921, this court found, concluded, and decided that the defendant had not submitted to the jurisdiction
55 of this court, and in that on the 29th day of April, 1921, and before the signing of the final judgment herein, defendant applied for leave to file a motion granting him permission to interpose an answer, which said motion and answer are set forth and described in Exhibit B hereto annexed and defendant offered to appear generally and to submit to the jurisdiction of the court in order to secure consideration of said motion and defendant applied for the immediate consideration of said motion.

2. That the final judgment or order herein be vacated and that leave be granted to defendant to interpose the answer mentioned and described in Exhibit B hereto annexed.

3. That the final judgment or order herein be vacated and that this action be dismissed unless within a time to be fixed by the court petitioner shall cause due process, order or rule to be served upon the substituted defendant so as to subject him to the jurisdiction of the court.

Washington, May 3, 1921.

(Signed) JOHN W. LASKEY,
United States Attorney.

(Signed) FREDERICK M. BROWN,
Colonel, Judge Advocate, U. S. A.

EXHIBIT A.

In the Supreme Court of the District of Columbia.

At Law.

No. 65058.

UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH, Petitioner,

vs.

JOHN W. WEEKS, Secretary of War, Respondent.

DISTRICT OF COLUMBIA, *ss:*

Frederick M. Brown being duly sworn deposes and says as follows:

1. On the 23rd of April, 1921, I *failed* herein as attorney for the defendant, under a special appearance, a motion to dismiss the action for want of jurisdiction of the person of the party defendant which said motion was argued and denied April 29, 1921.

2. In open court on the 29th of April, 1921, before submitting the motion aforesaid, I presented to the court the motion hereto annexed, marked Exhibit B; the two affidavits hereto annexed, marked Exhibits C and D, respectively; a copy of the letter of authority hereto annexed marked Exhibit E; a copy of the proposed first page of a new answer herein, hereto annexed marked Exhibit F;
56 and the proposed notice of hearing, hereto annexed marked Exhibit G. And at the same time I made oral application to the court to be permitted to file the same nunc pro tunc as of the time of the court's decision upon the motion to dismiss. The permission thus sought was not granted, the court stating that the application would be considered after the argument and decision of the pending motion.

3. On said 29th day of April, 1921, in the court room and prior to the opening of court, I presented to Col. Edward S. Bailey a copy of the papers mentioned in paragraph 2 hereof stating that they were papers supporting a motion herein intended to be effective the instant that a ruling upon the motion to dismiss should be made, and I asked Col. Bailey to accept the papers upon the understanding that my serving them was not to prejudice my contention, upon the pending motion to dismiss, that my appearance for the defendant was special and not general. Col. Bailey refused to accept the papers upon this understanding; and they were not left with him.

4. After the conclusion of the argument upon the motion to dismiss and immediately upon the court's oral announcement of its decision to deny the motion to dismiss, I orally renewed my application for leave to file the papers referred to in paragraph 2 hereof, to wit, Exhibits B, C, D, E, F, and G, and I asked the court to grant

an immediate hearing of the motion expressed in Exhibit B, stating that defendant would appear generally for that purpose if necessary. No distinct ruling upon said oral application was made by the court, except that the court shortly afterward signed a paper stated by the court to be the final judgment or order asked for and presented by the petitioner.

5. Before the final judgment or order was signed, as aforesaid, I requested the clerk to make a minute upon the records of this court showing the making of the application referred to in paragraphs 2 and 4 hereof and the rulings thereon. I am informed and believe that such minute has not been made. I desire, and I conceive the defendant to be entitled to an order requiring that the facts stated in paragraphs 2 and 4 hereof to appear upon the records of this court. In my opinion, said facts are material with reference to further proceedings herein in this court or in the appellate court or courts.

6. I have endeavored to cure the imperfections aforesaid in the records of this court by ex parte order. To that end, I drew on the 29th of April, 1921, the order hereto annexed and marked Exhibit H. My endeavor to present said order to his Honor Chief Justice McCoy on said day or to leave it with his secretary failed. The following day, I was not accorded an interview with Chief Justice McCoy, but I left said order with his secretary. On Monday, May 2, 1921, Chief Justice McCoy informed me that he would not sign the order
57 ex parte, but that I must notice a motion for said order or for a similar order in due course under the rules and practice.

7. In the course of the argument aforesaid on the 29th of April, 1921, Col. Edward S. Bailey read from a certain affidavit herein, said to have been verified by him on the 28th day of April, 1921. In certain respects, the assertions made therein are inaccurate, the truth in respect thereto being as follows:

(*a*) I attended in court on the 14th day of March, 1921, in response to a request from petitioner's attorneys which had been communicated to me by Major King, J. A., only a few minutes previously. Prior to leaving for court, it had been impossible for me to speak to the Acting Judge Advocate General or to the Secretary of War. In court, I explained this fact and I disavowed authority to speak for anyone or to represent the defendant generally or otherwise.

(*b*) In all acts done by me thereafter and until April 12, 1921, I acted and purported to act as counsel on behalf of the United States Attorney, who purported to be acting as attorney for the defendant. All of my acts were performed under his instructions and received his approval. From the time of my learning of the order of substitution which was entered herein March 10, 1921, until April 12, 1921, or thereabouts, I supposed that the United States Attorney had full authority to represent the substituted defendant for all purposes herein. On or about April 12, 1921, I learned that his

only authority to do so was that which he deemed to be implied in law without actual retainer or instructions from the defendant.

(c) In respect of my acts as counsel under instructions of the United States Attorney, I did not purport to represent, or to make appearance for the defendant generally. While not conceding that those acts in legal intendment and effect amount to a general appearance in any event, I assert that they cannot have that effect in this case because defendant did not authorize a general appearance for him to be made at that time. Otherwise I have only acted or purported to act for the substituted defendant specially in conformity with his instructions to me which instructions are set forth in the affidavit of John W. Weeks verified April 16, 1921, and in my affidavit verified April 23, 1921, both of which are on file herein.

8. That up to and including April 22, 1921, the substituted defendant had not appeared generally herein — was expressly adjudicated by the court; for the court on said April 22, 1921, denied defendant's motion for leave to file the answer annexed to said motion on the express ground, stated in open court, that said motion could not be granted or considered because defendant had not submitted to the jurisdiction of the court and was only appearing specially. I am informed and believe that the records of this court are de-
58 fective in failing to disclose the fact that an adjudication as to the nature of defendant's appearance was made April 22, 1921.

9. The decision made by the court April 29, 1921, to deny the motion to dismiss must, it would seem, have been based upon the theory that at that time the substituted defendant had submitted to the jurisdiction of this court. And yet there had been no act by defendant or any one else in the interval between April 22 and April 29, 1921, which, under any possible legal argument, could amount to a general appearance or to a submission to the jurisdiction of the court.

FREDERICK M. BROWN.

Sworn to before me this the third day of May, 1921.

[SEAL.] N. CURTIS LAMMOND,
Notary Public.

EXHIBIT B.

In the Supreme Court of the District of Columbia.

At Law.

No. 65058.

UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH, Petitioner,

vs.

JOHN W. WEEKS, Secretary of War, Respondent.

The motion of John W. Weeks, named herein as defendant, for an order dismissing the petition by reason of want of jurisdiction of the person of the party defendant, having been denied and the court having ruled that it has jurisdiction of the person of the party defendant, now comes said John W. Weeks and moves this court, upon his affidavit herein verified the 29th day of April, 1921, and hereto annexed, and upon his affidavit herein verified the 16th day of April, 1921, and annexed to and included in the papers upon which the motion herein was made and determined April 22, 1921, and upon the affidavit of Edward A. Kreger verified the 29th day of April, 1921, and upon the affidavit of Frederick M. Brown verified April 23, 1921, and filed April 23, 1921, in the office of the clerk of this court and upon all the papers and proceedings herein, for an order permitting defendant to file herein an answer, a copy whereof was included in the papers upon which the motion aforesaid was made and determined April 22, 1921, except that the defendant desires leave to substitute the page, a copy whereof is hereto annexed, instead of the first page of said proposed answer on which the motion was made April 22, 1921; and for the purpose of the submission
59 of the present motion the defendant, not limiting his appearance to the special appearance heretofore entered, makes such general or other appearance as is properly implied in said submission or as the court may rule to be necessary to that end.

(Signed) JOHN E. LASKEY,
United States Attorney.

(Signed) FREDERICK M. BROWN,
Colonel, Judge Advocate, U. S. A.

EXHIBIT C.

In the Supreme Court of the District of Columbia.

At Law.

No. 65058.

UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH, Petitioner,

vs.

JOHN W. WEEKS, Secretary of War, Respondent.

John W. Weeks, being duly sworn, deposes and says that he has conferred authority upon Col. E. A. Kreger, U. S. A., Acting Judge Advocate General of the Army, to cause a general appearance to be entered herein on his behalf in accordance with, and subject to the terms and conditions specified in a certain letter of authority dated the 29th day of April, 1921, a copy whereof is *hereby* annexed and made a part of this affidavit. Deponent further says that, except for the authority conferred upon Colonel Frederick M. Brown as set forth in deponent's affidavit verified the 16th of April, 1921, and in the affidavit of Frederick M. Brown verified the 23rd of April, 1921, and as herein set forth, deponent has at no time authorized anyone to appear for him or to represent him in this action.

JOHN W. WEEKS.

Sworn to before me this the 29th day of April, 1921.
[SEAL.] N. CURTIS LAMMOND,
Notary Public.

60 EXHIBIT D.

In the Supreme Court of the District of Columbia.

At Law.

No. 65058.

UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH, Petitioner,

vs.

JOHN W. WEEKS, Secretary of War, Respondent.

Edward A. Kreger, being duly sworn, deposes and says that he is the Acting Judge Advocate General of the United States Army and that pursuant to the power and authority conferred April 29, 1921,

upon him by the Secretary of War, he has empowered and requested John E. Laskey, U. S. attorney, to make such appearance (other than the appearance already made herein by Frederick M. Brown) as is described in, and as may prove necessary to enable consideration of, the foregoing motion to be had on the merits, and deponent has directed said Frederick M. Brown to support said motion as special attorney for the defendant and also (to the extent that is acceptable to the U. S. attorney) as counsel for the defendant upon any broader appearance made by the U. S. attorney.

EDWARD A. KREGER.

Sworn to before me this the 29th day of April, 1921.

[SEAL.] N. CURTIS LAMMOND,
Notary Public.

EXHIBIT E.

April 29, 1921.

Colonel E. A. Kreger,
Acting Judge Advocate General, U. S. A.:

DEAR SIR:

In the mandamus actions instituted by Colonel William F. Creary and by Colonel John W. French in the Supreme Court of the District of Columbia (actions at law, numbers 64936 and 65058) you are hereby authorized to enter, or cause to be entered by the U. S. Attorney or by any one else selected by you, my gneral appearance immediately upon the court's determining that it has acquired jurisdiction over me therein or at such other time as you may deem just and proper; and if the court shall decide in favor of its jurisdiction over me, you are hereby authorized to waive any further objection to the jurisdiction of the court to or reserve objection to such jurisdiction, notwithstanding your entering a general appearance on my behalf, whichever of those courses shall seem to you to be just and proper.

Yours truly,

JOHN W. WEEKS.
Secretary of War.

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EXHIBIT F.

In the Supreme Court of the District of Columbia.

At Law.

No. 65058.

THE UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH, Petitioner,

v.

JOHN W. WEEKS, Secretary of War, Respondent.

Answer of the Respondent, John W. Weeks, Secretary of War, to Petition for Mandamus and Rule to Show Cause.

John W. Weeks, Secretary of War, now and at all times saving and reserving unto himself all exceptions to the imperfections, uncertainties, and defects in the petition for writ of mandamus filed herein, and reserving unto himself the benefit of the lack of jurisdiction of the court, appearing on the face of said petition, to grant the relief prayed for, and the lack of jurisdiction of the court of and over the person of the above-named party defendant herein, and also the lack of jurisdiction of the court to direct him, as Secretary of War, to perform the act in question, and relying on the same for all purposes and also in like manner as if demurrer had been specifically interposed, for answer to said petition, or to *do* so much thereof as is material, and to said rule to show cause says, on information and belief, as follows:

1. As to the matters alleged in the first paragraph of the petition, respondent alleges that until December 23, 1920, petitioner was an Infantry officer of the Regular Army of the United States, with the rank of colonel, and that after said date petitioner has been and is a retired officer in said Army with rank of colonel. Respondent admits the remaining matters alleged in the first paragraph of the petition.

2. As to the matters alleged in the second paragraph of the petition, respondent alleges that on the 24th day of December, 1920, an order was made which purported to place, and which actually and duly placed petitioner on the retired list, since which time, petitioner has not held the office of a —.

1.

62 EXHIBIT G.

In the Supreme Court of the District of Columbia.

At Law.

No. 65058.

UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH, Petitioner,

vs.

JOHN W. WEEKS, Secretary of War, Respondent.

Messrs. Ansell & Bailey,
Attorneys for Petitioner:

Please take notice that in case pending motion to dismiss for want of jurisdiction of the person of the party defendant is denied this motion will be filed and brought on for hearing for the first motion day thereafter or for the first opportunity for hearing granted by the court in case earlier opportunity may be so granted.

(Signed) FREDERICK M. BROWN,
Colonel, Judge Advocate, U. S. A.
JOHN E. LASKEY,
United States Attorney.

EXHIBIT H.

In the Supreme Court of the District of Columbia.

At Law.

No. 65058.

UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH, Petitioner,

vs.

JOHN W. WEEKS, Secretary of War, Defendant.

The defendant having in open court on the 29th day of April, 1921, before submitting his motion to dismiss, asked leave to file the annexed motion and motion papers as of the time of the decision of said motion to dismiss and having renewed said request upon the announcing of the court's decision denying said motion to dismiss and having asked thereupon for immediate consideration of the annexed motion and the court having granted leave to file in the clerk's office said last-mentioned motion and motion papers and

having denied said application for immediate consideration thereof and having directed final judgment for the petitioner to be entered forthwith, now it is by the court this the 30th day of April, 1921,

Ordered that said motion and motion papers hereto annexed be filed nunc pro tunc as of April 29, 1921, immediately prior to the entry of final judgment herein and it is

Further ordered that said motion be denied.

———, *Chief Justice Supreme Court.*

63 *Notice.*

* * * * * * *

Messrs. Ansell and Bailey,
Attorneys for Petitioner:

Take notice that the aforegoing motion, dated this day, will be for hearing on the 6th day of May, 1921, at 10 a. m., before his Honor, Chief Justice McCoy.

Washington, May 3, 1921.

(Signed) JOHN W. LASKEY,
United States Attorney.

(Signed) FREDERICK M. BROWN,
Colonel, Judge Advocate, U. S. A.

Supreme Court of the District of Columbia.

Friday, May 27, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

Upon consideration of the motion of John W. Weeks, filed herein May 23, 1921, and accompanying exhibits, to correct the record and to vacate the judgment entered in this cause on the 29th day of April, 1921, it is ordered that said motion be, and it is hereby, overruled.

Memorandum.

June 16, 1921.

Time for filing transcript of record extended to and including July 12, 1921.

Assignment of Errors.

Filed July 1, 1921.

* * * * * * *

John W. Weeks, named as the substituted defendant herein, hereby assigns error in the final order or judgment of the Supreme

Court of the District of Columbia signed and entered on the 29th day of April, 1921, in the following particulars:

First. For that the court awarded and directed the issuing of a peremptory writ of mandamus commanding the said defendant to vacate a certain War Department order made December 24, 1920, by or by the authority of his predecessor in the office of Secretary of War, which order retired the relator from active service in the Army and placed him on the retired list and commanding the said
64 defendant to induct the relator into the office of colonel of Infantry in the Army on the active list thereof.

Second. For that the court refused to dismiss the petition for failure to state a good cause of action.

Third. For that the court held and decided that the answer filed by Newton D. Baker, the original defendant herein, to the petition was insufficient to constitute a defense to the petition.

Fourth. For that the court sustained relator's demurrer, to the answer of said Newton D. Baker and refused to permit proof to be made in respect of the issues of fact raised by the petition and by the said answer.

Fifth. For that the court held and decided that the action taken in any case by the final classification board under section 24*b* of the act of June 4, 1920 (41 Stat. 759, 773), commonly called the Army reorganization act, is ineffective unless actually reviewed through the personal and individual consideration of the Ppresident.

Sixth. For that the court refused to hold that the action of said final classification board is effective and binding, unless the President see fit to intervene by way of ordering a revision of its action.

Seventh. For that the court, in awarding mandamus in this case, violated the rule that mandamus is not the proper remedy to cure the effect of an improper executive act not enjoined upon the defendant official by law or to cure the effect of one involving judgment or discretion; the acts of the Secretary of War in this case being not only not enjoined upon him by law, but also involving judgment and discretion.

Eighth. For that the court, in awarding mandamus in this case, violated the rule that mandamus is not the proper remedy if the relator has another adequate remedy; relator's only justiciable, ultimate right in this case (if any right existed) being a right to compensation and his only intermediate right being a right to have the final clasification board submit his case to the President for personal attention and consideration by the President, the rights aforesaid being enforceable by action in the Court of Claims and by mandamus against the members of said board, respectively.

Ninth. For that the court, in awarding mandamus in this case, violated the rule that mandamus is not the proper remedy where no substantial injustice to relator is shown or where the alleged

wrong suffered by the relator falls short of being clear and indisputable; the fact being in this case that the relator has, by his demurrer, admitted that he has not always rendered efficient service to the Army and the relator's right to redress, if any there be, is of a very doubtful nature, owing, among other things, to uncertainties and ambiguities in the statute involved, a statute not previously interpreted by the courts.

65 Tenth. For that the court refused to hold that it is entirely optional with the President whether or not he considers cases arising under section 24*b* aforesaid, and that it is entirely optional with him whether or not the fact of the pendency of such cases shall be brought to his notice.

Eleventh. For that the court refused to hold that any action necessary or appropriate to be taken in cases arising under said section 24*b*, by the President or under presidential authority, may properly and effectively be delegated by him to the Secretary of War, and, in particular, for that the court refused to hold that the President may properly and effectively delegate to the Secretary of War the duty of determining which of said cases merit the time and personal consideration of the President and which cases do not.

Twelfth. For that, after dismissing Newton D. Baker as a party defendant herein and naming John W. Weeks as the substituted party defendant by order made and entered herein March 10, 1921, the court took any proceeding, until after its process or some appropriate notice should have been served upon said John W. Weeks or until after he should have appeared generally herein; and in particular, for that the court entered a final judgment or order herein and awarded a peremptory writ of mandamus against said John W. Weeks without any such process, notice, or appearance.

Thirteenth. For that the court at no time had jurisdiction of the person of the said John W. Weeks; and for that the court has neglected and omitted to cause process or notice to be served on said John W. Weeks so as to acquire jurisdiction of his person; and for that the court has held and decided that it has acquired jurisdiction over John W. Weeks by general appearance; and for that the court refused to dismiss the action for want of jurisdiction upon motion to that end duly filed April 23, 1921, and submitted April 29, 1921, under a special appearance.

Fourteenth. For that the court by its writ of mandamus assumed to command the performance by the substituted defendant of two acts which are for him perfectly impossible; to wit, investing relator, who has become a retired officer, with the office of colonel of Infantry on the active list, an act within the competency of the President and Senate alone and creating for relator the office of colonel of Infantry on the active list formerly held by him without nomination or confirmation, which said office, even if relator's order of retirement aforesaid had been void, would have expired March 4, 1921, with the end of the session of the Senate of the United States, in virtue of Article 2, section 2, clause 3, of the Constitution.

Fifteenth. For that the court has denied to the defendants or any of them an opportunity of showing by amended or supplemental answer the facts which, since the filing January 25, 1921, of the answer of Newton D. Baker, have become material owing to the end of the session of the Senate March 4, 1921.

66

Sixteenth. For that the court refused to consider on its merits the motion of John W. Weeks filed April 20, 1921, and submitted April 23, 1921, for leave to interpose an answer of his own, a copy of which intended answer was submitted with the motion, notwithstanding the fact that said John W. Weeks formally offered to appear generally as a condition to the desired leave being granted and notwithstanding the fact that the court has subsequently ruled that his acts prior to April 22, 1921, constituted a general appearance.

Seventeenth. For that the court has denied to John W. Weeks the right to a due hearing, since due hearing can not be had without opportunity to plead.

Eighteenth. For that the court on the 25th day of April, 1921, refused to grant a rule to show cause of such nature that, if granted, an opportunity would have been afforded to said John W. Weeks on the 29th day of April, 1921, or at all events before final judgment, of submitting his motion for leave to interpose his own answer on any terms exacted by the court, but without waiving his right to a decision upon his contention that the court had not yet acquired jurisdiction over his person.

Nineteenth. For that the court entered final judgment herein immediately after overruling the motion to dismiss for want of jurisdiction and without affording opportunity to submit the motion of John W. Weeks for leave to interpose an answer of his own or to amend the answer of Newton D. Baker, notwithstanding urgent requests on behalf of said John W. Weeks to be afforded such opportunity and notwithstanding his offer to enter any appearance necessary to enable a motion to that end to be considered on its merits.

Twentieth. For that the court refused to direct that the minutes of the court should record the requests and offer which were made as aforesaid, before final judgment.

Twenty-first. For that the court overruled the motion filed May 3, 1921, and submitted May 23, 1921, or any part thereof.

JOHN E. LASKEY,
Attorney of the United States in
and for the District of Columbia,
Attorney for Respondent.

67 *Designation of Record.*

Filed July 1, 1921.

* * * * * * *

In preparing the record on appeal in the above entitled cause, the clerk will please include—

1. All docket entries relating to this case.

2. All minute entries relating to this case, especially those (*a*) of March 10, 1921, appearing at page 294 of volume 70 of minutes; (*b*) of March 12, appearing at page 298 thereof; (*c*) of March 18, appearing at page 315 thereof; (*d*) of March 21, appearing at page 317 thereof; (*e*) of April 22, appearing at page 360 thereof; (*f*) of April 29, appearing at pages 371, 372 thereof; (*g*) of May 27, appearing at page 397 thereof; and (*h*) of June 16, appearing at page 432 thereof.

3. Petition for writ of mandamus.

4. Rule of January 21, 1921, ordering Newton D. Baker to show cause.

5. Answer of Newton D. Baker to petition, with eleven exhibits annexed to said answer.

6. Relator's demurrer to answer of Newton D. Baker.

7. Order of substitution entered March 10, 1921.

8. Memorandum of decision of court sustaining demurrer, filed March 12, 1921.

9. Rule to show cause granted March 18, 1921, with affidavit of Frederick M. Brown verified March 17, 1921.

10. Relator's answer to rule.

11. Opinion of court, filed March 26, 1921.

12. Motion for leave to amend answer or to file amended answer, which was argued April 1, 1921, and decided April 11, 1921.

13. Memorandum of the decision of the court, made and filed April 11, 1921, in respect of the motion argued April 1, 1921.

14. Motion filed April 20, 1921, with affidavit of John W. Weeks verified April 16, 1921, and copy of proposed answer verified April 16, 1921, in support of said motion.

15. Memorandum of the decision of the court made April 22, 1921, upon said motion; which memorandum was filed May 23, 1921.

16. Proposed rule to show cause returnable April 29, 1921, which was presented ex parte April 23, 1921, and was refused April 23, 1921, and filed the same day; together with affidavit of Frederick M.

Brown, verified April 23, 1921, in support of rule, with autograph memorandum of refusal by Chief Justice McCoy and with note stating that first page of proposed answer referred to in motion is
68 the same as Exhibit F annexed to motion filed May 3, 1921, and submitted May 23, 1921.

17. Motion to dismiss filed April 23, 1921, and submitted April 29, 1921.

18. Affidavit of Edward S. Bailey read April 29, 1921, in opposition to motion to dismiss filed April 23, 1921.

19. Final order or judgment entered April 29, 1921.

20. Motion filed May 2, 1921, and submitted May 23, 1921; together with papers annexed thereto, to wit Exhibits A, B, C, D, E, F, G, and H.

21. Memorandum of decision of court made May 27, 1921, upon motion filed May 3, 1921.

22. Assignment of errors.

23. This designation.

JOHN E. LASKEY,
Attorney of the United States in and for the District of Columbia, Attorney for Respondent.

Service of copy of above upon us June 25, 1921.
ANSELL & BAILEY,
Attorneys for Petitioner.

Memorandum.

July 8, 1921.

Time for filing transcript of record extended to and including August 1, 1921.

Supreme Court of the District of Columbia.

No.	Parties.	Action.	
65058	The United States of America ex relatione John W. French vs. John W. Weeks, Secretary of War.	Mandamus.	Plaintiff's attorney: Ansell & Bailey, T. T. Ansberry. Defendant's attorney: U. S. Atty.

Date.	Proceedings.	
1921, Jan. 21.	Petition, Exhibits "A" & "B" & appearance Ansell & Bailey & Ansberry & order to file.	Filed.
" " "	Respondent ordered to show cause by Jany. 28 why writ should not issue (M. 70, p. 227).	

Date.			Proceedings.	
1921,	Jan.	21.	Rule to show cause & 1 copy cert.	Issued.
"	"	21.	Appearance U. S. attorney for defdt. order.	Filed.
"	"	25.	Answer of respondent & exhibits (7).	"
"	"	31.	Demurrer to answer of re-pondent.	"
69				
1921,	Mch.	10.	Order substituting John W. Weeks, Secretary of War in lieu of N. D. Baker, party defendant (M. 70, p. 292).	
"	"	12.	Demurrer to answer of respondent sustained (M. 70, p. 298).	
"	"	"	Memo. of court.	Filed.
"	"	18.	Affidavit & rule on relator to show cause (M. 70, p. 315).	
"	"	21.	Ans. of relator to rule.	"
"	"	"	Oral mo. of respdt. to revoke and annul memo. decision of Mch. 12, & reconsider all issues, to overrule petitioner's demurrer to respdt.'s answer, & dismiss petition overruled without prejudice (M. 70, p. 317).	
"	"	26.	Opinion of court.	Filed.
"	Apr.	11.	Memo of court.	"
"	"	20.	Appearance special of defdt. Weeks by Fredk. M. Brown—Motion for leave to file answer, affidavit & proposed answer & notice.	
"	"	22.	Mo. for leave to file amended answer denied (M. 70, p. 360).	
"	"	23.	Mo. of deft. Weeks to dismiss cause & notice.	"
"	"	25.	Affidavit of atty. for defendant in support of motion for rule to show cause why new answer should not be filed, copy of proposed rule & endorsement showing denial thereof by Chief Justice.	"
1921,	Apr.	29.	Affidavit in opposition to mo. of Apr. 23, to dismiss & exhibits (4).	Filed.
1921,	Apr.	29.	Writ of mandamus ordered to issue (M. 70, p. 372). Appeal noted.	
"	"	"	Motion to dismiss action overruled (M. 70, p. 371).	
"	May	3.	Mo. of defdt. to correct record & vacate judgment Exhibits A to H inc. & notice.	
"	"	23.	Memo. of court.	Filed.
"	"	27.	Motion to correct record & to vacate judgment of April 29, 1921, overruled (M. 70, p. 397).	

Date.	Proceedings.	
1921, June	16. Time to file transcript extended to July 12 (M. 70, p. 432).	
" July	1. Assignments of error.	Filed.
" "	1. Designation of record.	"
" "	8. Time to file transcript extended to Aug. 1, 1921 (M. 70, p. 482).	

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 105, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 65058 at law, wherein The United States of America, ex relatione John W. French, is petitioner and Newton D. Baker is respondent, as the same remains upon the files and of record in said court.

70 In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 21st day of July, 1921.

[SEAL.] MORGAN H. BEACH,
Clerk.

(Indorsement on cover:) District of Columbia Supreme Court. No. 3694. John W. Weeks, Secretary of War, Appellant, vs. The United States of America, ex relatione John W. French. Court of Appeals, District of Columbia. Filed July 26, 1921. Henry W. Hodges, Clerk.

71 Friday, October 7th, A. D. 1921.

* * * * * * *

No. 3693.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY

and

No. 3694.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH.

The argument in the above entitled causes was commenced by Mr. L. H. Vandoren, attorney for the appellant.

Monday, October 10th, A. D. 1921.

* * * * * * *

No. 3693.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY

and

No. 3694.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH.

The argument in the above entitled causes was continued by Messrs. Samuel T. Ansell and Chas. P. Caldwell, attorneys for the appellees, and was concluded by Mr. Frederick M. Brown, attorney for the appellant.

72 In the Court of Appeals of the District of Columbia.

No. 3694.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH, Appellee.

Opinion.

Mr. Justice VAN ORSDEL delivered the Opinion of the Court.

The only distinction between this case and No. 3693, Weeks vs. United States ex rel. Creary, just decided, is that the Honest and Faithful Board found that appellee's classification in class B was not due to his neglect, misconduct or avoidable habits. He was accordingly retired from the service. The same reasons for denial of the writ of mandamus exist here as in the Creary case.

The judgment is reversed with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

73 January Term, 1922.

Tuesday, January 3rd, A. D. 1922.

* * * * * * *

No. 3694.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the Said Supreme Court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this court.

Per MR. JUSTICE VAN ORSDEL,
January 3, 1922.

74 In the Court of Appeals of the District of Columbia.

No. 3694.

No. 22, Special Calendar.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH, Appellee.

Motion for Writ of Error.

Now comes the Appellee in the above-entitled cause and prays the Court for a writ of error to remove the same to the Supreme Court of the United States; to stay mandate; and to fix a nominal bond to act as a supersedeas and for cause shows:

1. That writ of error lies under paragraph 3 of Section 250 of the Judicial Code in that the Appellee, in being deprived of his office upon the active list as an officer of the Army of the United States, was denied due process of law guaranteed by the Constitution of the United States.

2. That writ of error lies under paragraph 5 of Section 250 of the Judicial Code in that the existence of the authority of the President of the United States to delegate to the Secretary of War the power

(*a*) to approve the action of the Final Classification Board

(*b*) to approve the action of the Board of Officers

(*c*) to place the Appellee upon the retired list of the Army of the United States under the purported authority of Section 24*b* of the Act of June 4, 1920, known as the Army Reorganization Act,

is drawn in question.

3. That writ of error lies under paragraph 5 of Section 250 of the Judicial Code in that the existence of the authority or power of the Secretary of War

(*a*) to approve the finding of the Final Classification Board

(*b*) to approve the finding of the Board of Officers

(*c*) to place the Appellee upon the retired list of the Army of the United States

is drawn in question.

75 4. That writ of error lies under paragraph 6 of Section 250 of the Judicial Code for that the construction of Section 24*b* of the Act of June 4, 1920, known as the Army Reorganization Act,

is drawn in question by the respondent who relies upon said Act as authority for the approval of the action of the Final Classification Board, the Board of Officers, and as authority for his right to place the Appellee upon the retired list of the Army of the United States.

Respectfully submitted,

SAMUEL T. ANSELL,
EDWARD S. BAILEY,
CHARLES POPE CALDWELL,
Attorneys for the Appellee, John W. French.

Service of copy of the above this day received.

PEYTON GORDON,
U. S. Attorney.

Jan. 16/22.

(Endorsed:) No. 3694. John W. Weeks, Secretary of War, Appellant, vs. United States of America ex rel. John W. French. Motion for writ of error. Court of Appeals, District of Columbia. Filed Jan. 16, 1922. Henry W. Hodges, Clerk.

76 Friday, January 20th, A. D. 1922.

* * * * * * *

No. 3694.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH.

On consideration of the motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States and to stay the mandate until further order, It is ordered by the Court that said motion be and the same is hereby granted, and the bond to act as supersedeas is fixed at the sum of three hundred dollars.

77 In the Court of Appeals of the District of Columbia.

No. 3694.

JOHN W. WEEKS, Secretary of War, Appellant,

v.

UNITED STATES OF AMERICA ex Rel. JOHN W. FRENCH, Appellee.

Assignments of Error.

John W. French, the appellee herein and plaintiff in error, hereby assigns error in the final order or judgment of the Court of Appeals

of the District of Columbia entered on the third day of January, nineteen hundred and twenty-two, in the following particulars:

1. The Court of Appeals of the District of Columbia erred in holding that the Secretary of War had the power to review and approve the action of the Final Classification Board, the action of the Board of Officers, and to place John W. French upon the retired list of the Army of the United States.

2. The Court of Appeals erred in holding that the President had the power to delegate to the Secretary of War the authority to review and approve the action of the Final Classification Board, the action of the Board of Officers, and to place John W. French upon the retired list of the Army of the United States.

3. The Court of Appeals erred in holding that the duty required of the President by the Act of June 4, 1920 (41 Stat. L. 759-773) to review the action of the Final Classification Board, and the Board of Officers, and his power to place an officer upon the retired list of the Army of the United States under said Act, are administrative and not judicial, and can be delegated.

78 4. The Court of Appeals erred in holding that the duty required by the said Act of June 4, 1920 to review the action of the final Classification Board and the Board of Officers, and the power given by that Act to place an officer upon the retired list of the Army of the United States need not be exercised personally by the President.

5. The Court of Appeals erred in holding that it was without jurisdiction to compel the Secretary of War to vacate the order made by the Secretary of War placing John W. French upon the retired list of the Army of the United States and to restore him to his office as colonel upon the active list of the Army of the United States from which he had been retired.

SAMUEL T. ANSELL,
EDWARD S. BAILEY,
CHARLES POPE CALDWELL,
Attorneys for John W. French.

79 [Endorsed:] In the Court of Appeals of the District of Columbia. No. 3694. John W. Weeks, Secretary of War, Appellant, v. United States of America, ex rel. John W. French, Appellee. Assignments of Error. Court of Appeals, District of Columbia. Filed Jan. 26, 1922. Henry W. Hodges, Clerk. Ansell & Bailey, Attorneys at Law, Albee Building, Washington, D. C.

80 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before

you, or some of you, between John W. Weeks, Secretary of War, Appellant, and The United States of America, ex relatione John W. French, Appellee, a manifest error hath happened, to the great damage of the said Appellee, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 26th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal of the Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

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81 (*Bond on Writ of Error.*)

Know all men by these presents, That we, John W. French, as principal, and United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto John W. Weeks, Secretary of War, in the full and just sum of Three Hundred ($300.00) Dollars to be paid to the said John W. Weeks, Secretary of War, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 26th day of January in the year of our Lord one thousand nine hundred and Twenty-two.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between John W. Weeks, Secretary of War, Appellant and United States of America, ex relatione John W. French, Appellee, #3694 a judgment was rendered against the said John W. French on the third day of January, nineteen hundred and twenty-two, and the said John W. French having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said John W. Weeks, Secretary of War citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said John W. French, shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

JOHN W. FRENCH, [SEAL.]
By EDWARD S. BAILEY,
His Attorney.

[Seal of U. S. Fidelity & Guaranty Co.]

UNITED STATES FIDELITY & GUARANTY CO.,
By LEE B. MOSHER, [SEAL.]
Attorney in Fact.

K. M. WATERS.
L. R. SAUR.
K. M. WATERS.
L. R. SAUR.

Approved by—

CONSTANTINE J. SMYTH,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 3694. John W. Weeks, Secretary of War, Appellant, vs. U. S. ex rel. John W. French. Supersedeas Bond on Writ of Error. Court of Appeals, District of Columbia. Filed Jan. 26, 1922. Henry W. Hodges, Clerk.

82 UNITED STATES OF AMERICA, *ss:*

To John W. Weeks, Secretary of War, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United States of America, ex relatione John W. French is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 26th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged.
PEYTON GORDON,
United States Attorney,
Counsel for Secretary of War.
Jan. 26, 1922.

83 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 82 inclusive constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of John W. Weeks, Secretary of War, Appellant, vs. The United States of America, ex relatione John W. French, No. 3694, January Term, 1922, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 27th day of January, A. D. 1922.

[Seal of the Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 28,679. District of Columbia Court of Appeals. Term No. 724. The United States of America ex relatione John W. French, plaintiff in error, vs. John W. Weeks, Secretary of War. Filed January 30th, 1922. File No. 28,679.